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# Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence


## Cover Page Footnote

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I wish to thank Owen Fiss for his invaluable encouragement to pursue this project. I would also like to thank Lisa Eichhorn and Robin Wilson for superb suggestions. I am grateful to Adrianne Carr and Jane Merrill for their helpful research assistance.



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# ARTICLES

# DISPLACING DISSENT: THE ROLE OF "PLACE" IN FIRST AMENDMENT JURISPRUDENCE

*Thomas P. Crocker**

## INTRODUCTION

Would the principle of free speech have value if there were no public place to speak? What would be the point of dissent if political differences were relegated to the realm of "freedom of thought," disappearing into the silent mental lives of those who harbor political disagreement with prevailing orthodoxy? What would be the value of free speech if public dissent disappeared? These are not idle questions. Under current First Amendment jurisprudence, public officials exercise increasingly effective means of displacing dissent through the regulation of place. By rendering dissent invisible, official control over the location of speech threatens a core, even romantic, value protected by the First Amendment.[1]

There can be no doubt about the importance of the "freedom to think as you will"[2] to our understanding of the First Amendment.[3] Yet the protection of the First Amendment is widely thought to extend far beyond the freedom to think; it also includes the freedom "to speak as you think."[4] If the freedom to speak as one thinks is merely a freedom to speak privately to oneself, then one might wonder why all the fuss over the First

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1. "The First Amendment has a special regard for those who swim against the current, for those who would shake us to our foundations, for those who reject prevailing authority." Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America 10 (1999) [hereinafter Shiffrin, Dissent]; *see also* Steven H. Shiffrin, The First Amendment, Democracy, and Romance (1990). The figure of the dissenter, and the importance of dissent, are well-embedded in popular imagination. Indeed, "[e]veryone, it seems, believes in dissent." Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745, 1746 (2005).

2. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

3. Indeed, Justice Oliver Wendell Holmes emphasized freedom of thought, noting, "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

4. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

Amendment?[5] Accordingly, the First Amendment in general, and the Free Speech Clause in particular, encompass more than speech uttered behind closed doors. The U.S. Supreme Court has held that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."[6] Public debate presupposes the existence of places where the public can engage in discourse and access to public fora where these practices may occur. To engage in public discourse is to be situated in relation to other persons in terms of place and space.

Because *where* we speak is often just as important as *what* we say, increased efforts by the government to restrict the location of speech threaten to undermine the guarantees of the First Amendment. The Supreme Court's current free speech doctrine permits the imposition of reasonable time, place, and manner restrictions on speech without raising constitutional concerns.[7] Government officials have seized upon this doctrinal permissiveness to develop practices that suppress and control the content of speech by regulating the place of speech. Such suppression and control is most (in)visible in the case of political dissent. Dissent or political protest is expressed most effectively in public, especially at places where government officials—above all the President—appear. To convey a message of dissent is to convey no message at all if it is spoken where no other persons—much less the targeted government officials—can hear or see the message. It is precisely this aim—the elimination of dissenters' ability to appear *as* dissent to specific audiences—that has been the object of much recent regulation.

Regulation of place has stifled political dissent by creating special "protest zones" at presidential appearances,[8] by deploying free speech cages at national party conventions,[9] and by designating large areas of urban centers as "restricted zones."[10] More generally, officials control or displace

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5. Justice Benjamin N. Cardozo emphasized the fundamental importance of the freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327 (1937).

6. Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940).

7. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569, 576 (1941) (upholding a state statute requiring a license to march on city streets because the state "cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets").

8. James Bovard, *Quarantining Dissent: How the Secret Service Protects Bush from Free Speech*, S.F. Chron., Jan. 4, 2004, at D1.

9. *See* Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 74 (D. Mass. 2004) (describing a demonstration zone as an "internment camp"); John Kifner, *Demonstrators Steer Clear of Their Designated Space*, N.Y. Times, July 26, 2004, at P3.

10. Menotti v. City of Seattle, 409 F.3d 1113, 1142 (9th Cir. 2005) (concluding that a "restricted zone" covering downtown Seattle that excluded World Trade Organization (WTO) protestors was a reasonable time, place, or manner restriction).

speech by establishing university "free speech zones,"[11] limiting mass protests such as those in New York against the Iraq War,[12] and restricting use of sidewalks,[13] malls,[14] and airports.[15]

The simple regulation of place has made dissent effectively invisible, practically pointless, and criminally dangerous. For example, when President George W. Bush visited Columbia, South Carolina, in 2002, Brett Bursey sought to welcome him with a sign that read "No War for Oil."[16] Standing among others who were waiting to greet the President without messages of dissent, Bursey was ordered by officials to remove himself to a designated protest zone three quarters of a mile away and out of sight of the President.[17] When he refused, he was arrested, charged with violating 18 U.S.C. § 1752,[18] and later convicted of violating Secret Service restrictions on a person's presence where the President is temporarily visiting.[19] Bursey was not singled out simply because he wished to convey a message of dissent, but because he wished to convey a message of dissent in a particular place and in the presence of other persons standing along a roadway to greet the President as he passed. By the simple regulation of place, government officials succeeded in suppressing dissent.[20]

Many commentators lament the decline of the public sphere brought about by the increased organization of modern life.[21] Quite apart from rising concerns over security, modern life has diminished the role of traditional places where the public might gather and mingle, such as town greens, parks, sidewalks, and pedestrian streets.[22] Justice Anthony

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11. *See generally* Carol L. Zeiner, *Zoned Out! Examining Campus Speech Zones*, 66 La. L. Rev. 1 (2005).

12. *See, e.g.*, Robert D. McFadden, *From New York to Melbourne, Cries for Peace*, N.Y. Times, Feb. 16, 2003, at A1.

13. United States v. Kokinda, 497 U.S. 720 (1990) (upholding restrictions on speech on a sidewalk leading to a post office).

14. Hudgens v. NLRB, 424 U.S. 507 (1976) (finding no First Amendment right to exercise free speech at a privately owned shopping center).

15. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992) (upholding regulations on speech in airport terminals).

16. *See* Jonathan M. Katz, *Thou Dost Protest Too Much: An Old Law Turns Protestors into Threats Against the President*, Slate, Sept. 21, 2004, http://www.slate.com/id/2107012/.

17. *Id.*

18. 18 U.S.C.A. § 1752 (West 2006). The statute makes it illegal intentionally to "impede or disrupt the orderly conduct of Government business or official functions, to engage in disorderly or disruptive conduct in, or within such proximity to, any building or grounds" where the President is visiting. *Id.* § 1752(a)(2).

19. The Fourth Circuit upheld Brett Bursey's conviction by U.S. Magistrate Bristow Marchant. United States v. Bursey, 416 F.3d 301 (4th Cir. 2005).

20. This story is similar to many others, with the exception that Bursey was convicted of violating § 1752. *See* Bovard, *supra* note 8; Katz, *supra* note 16.

21. *See, e.g.*, Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society (Thomas Burger trans., MIT Press 1991) (1962); Iris Marion Young, Justice and the Politics of Difference (1990); Cass R. Sunstein, *The Future of Free Speech*, *in* Eternally Vigilant: Free Speech in the Modern Era 285, 285-87 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

22. *See* Cass Sunstein, Republic.com 27-34 (2001).

Kennedy has noted this problem: "Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."[23] Although the Internet provides a vibrant new forum for discursive practices, there is a countervailing worry that the ability to select content to an ever more refined degree will lead to greater social fragmentation.[24] Moreover, the Internet does not provide for serendipitous occasions to encounter others face-to-face or to discover the new or the strange in both a social and public setting.[25] Trends of modern life and government regulation of public fora have led to the disappearance of meaningful public discourse, dissent, and protest from the public sphere. Thus, the combination of the physical displacement of traditional public spheres with the strategic disruption of political protest provides ample reason to question whether the bland treatment of place in the Court's current First Amendment jurisprudence appropriately protects, let alone enables, the values of free speech.

This Article argues that within the free speech tradition, we need to reconsider the ways that public policy, legal doctrine, and constitutional theory treat the role and value of "place" in public discursive practices. A refocused consideration of the essential role of "place" is necessary to both understand and achieve the values of free speech.

The traditional approach to place in First Amendment jurisprudence depends on "content-neutral" analysis and reasonable time, place, and manner restrictions. Consequently, courts and critics (1) largely ignore the need to protect places and spaces for public discourse; (2) presuppose the existence of an autonomous self who seeks to express ideas formed "privately" outside of public discursive practices; and (3) fail to recognize the value of contributing something new to public discourse. Furthermore, free speech theory and policy have paid too little attention to the importance of not only protecting, but also fostering the spaces and places where free speech might flow.[26]

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23. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., dissenting).

24. In a park, one cannot avoid the serendipitous encounter with strangers, and perhaps with strange ideas. On the Internet, one can "filter" out chance encounters, receiving only the content one desires.

25. On the role of face-to-face encounters with others in public space, see Sunstein, *supra* note 22, at 27-34; Young, *supra* note 21. On the ethical importance of face-to-face encounters, see Emmanuel Levinas, Totality and Infinity: An Essay on Exteriority 174 (Alphonso Lingis trans., 1969) ("To see the face is to speak of the world. Transcendence is not an optics, but the first ethical gesture."); *see also* Robert Eaglestone, Ethical Criticism: Reading After Levinas 129-70 (1997).

26. Steven Shiffrin ably argues that the First Amendment needs to do more than simply protect dissent. "Free Speech theory should be taken beyond protecting or tolerating dissent: the First Amendment should be taken to reflect a constitutional commitment to *promoting* dissent." Shiffrin, Dissent, *supra* note 1, at 91.

This Article contributes to our thinking about the need to protect and foster the "place" for free speech.[27] Part I outlines the broad features of the current problem of place in the context of a rich free speech tradition. Part I.A provides a short background on the development of this tradition. Part I.B focuses specifically on case law charting the development and current character of place restrictions.

Part II demonstrates that free speech policy too frequently regulates place to the detriment of speech in ways that are harmful to at least two fundamental First Amendment values: autonomy and collective self-determination. Much of First Amendment discourse focuses on attempting to define the core value of free speech. This pits advocates of autonomy in theoretical conflict with advocates of values such as deliberation and collective self-determination.[28] To understand what motivates free speech analysis, scholars, critics, and courts have been keen to determine what value(s) animate the First Amendment. Analyzing two of the most widely shared of these values—autonomy and collective self-determination—Part II argues that advocates of each of these values have largely ignored the use of place to restrict free speech in ways that have detracted from the very values they seek to promote.

Ultimately, this Article argues that neither autonomy nor democracy can flourish if the public places in which these values are realized cease to exist. In pursuit of this argument, Part III turns to a discussion of Hannah Arendt's political theory to suggest that the very possibility of autonomy and democracy depends on fostering public places where speech and autonomy may appear.

Part IV argues that in three relevant doctrinal areas—media access, the public forum, and captive audiences—the Supreme Court consistently fails to protect speech from being regulated by place. One way of proscribing speech without directly proscribing speech is to ask and answer a prior question: "Where is one allowed to speak?" Quite often, this question is

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27. For other recent contributions to thinking about place, see generally Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 Geo. Wash. L. Rev. 439 (2006) (borrowing concepts from anthropology and cultural geography to map "expressive topography" for purposes of First Amendment analysis); Timothy Zick, *Speech and Spatial Tactics*, 84 Tex. L. Rev. 581 (2006) (diagnosing a problem with use of "spatial tactics," and advocating a role for what he calls "expressive place").

28. *Compare* Owen M. Fiss, *Free Speech and Social Structure*, 71 Iowa L. Rev. 1405, 1410 (1986), *with* Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 Mich. L. Rev. 1517, 1523 (1997) (reviewing Owen Fiss, Liberalism Divided: Freedom of Speech and the Many Uses of State Power (1996)). *See generally* Morris Lipson, Note, *Autonomy and Democracy*, 104 Yale L.J. 2249, 2275 (1995) (defending a version of Fiss's collectivism against Post's individualist challenge by arguing that "some autonomy *depends upon* inputs to the citizen from outside her, and hence depends upon a kind of assistance from others"). Moreover, some observers see this theoretical conflict over core First Amendment values as an actual threat to free speech by the advocates of deliberative democracy. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. Chi. L. Rev. 225, 226 (1992) ("So it is with no pleasure that I note that in this country, in classrooms and law reviews, the great liberal ideal of free expression is under attack.").

raised to address legitimate policy considerations. There are, in fact, appropriate times, places, and means of expressing ideas to the public. Using sound trucks to convey a message in a residential neighborhood while people are trying to rest or sleep would not be the appropriate place, time, or manner to express an idea.[29] Speakers can disrupt the lives of others. The possibility of unwelcome disruption creates an opportunity to regulate the place for speech. However, these regulations have expanded beyond the clear cases of legitimate policy (sound trucks) to questionable attempts to avoid disruption ("protest zones").[30] Government actors may control otherwise protected speech content by basing their restrictions on the prior question of the place of speech, regardless of whether such regulation disrupts the expectations of a "captive audience"[31] or frustrates attempts to address others in a putative "public forum." For example, it is possible, simply by regulating a speaker's location in a content-neutral manner, to limit or eliminate the speaker's ability to convey a message to a desired audience. To evaluate the propriety of such restrictions, the Supreme Court has developed the "public forum" doctrine. However, as Part IV will demonstrate, this doctrine provides little effective constitutional review of regulations other than those imposed on "traditional public fora," such as sidewalks and parks.[32]

It is important to note that this Article does not argue that, once the theoretical underpinnings of the First Amendment are clearly defined, judicial policy and doctrine concerning place will follow automatically. Rather, by gaining a clearer theoretical understanding of the role of place in the development of meaningful autonomy and deliberative democracy, we will possess new conceptual tools to enable fresh approaches to the theory, policy, and practice of the First Amendment.

## I. THE FIRST AMENDMENT PROBLEM: SUPPRESSING SPEECH BY REGULATING PLACE

### A. *The First Amendment Tradition: An Overview*

Professor Harry Kalven's seminal work bears a suitably lofty title describing the development of First Amendment jurisprudence: *A Worthy Tradition*.[33] Indeed, this tradition is worthy in many ways. Not only has it tended, over time, towards the protection of speech, but it has also fostered

29. *See* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding restrictions on use of sound trucks).

30. *See supra* notes 8-15 and accompanying text.

31. The "captive audience" doctrine is addressed *infra* Part IV.C.

32. Even these traditional public fora can be subject to prior licensing restraints under the theory that the state can operate as a parliamentarian to provide order and avoid a cacophony of voices in the public sphere. *See, e.g.*, Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding convictions of Jehovah's Witnesses for failing to obtain a permit before engaging in a parade or procession).

33. Harry Kalven, Jr., A Worthy Tradition: Freedom of Speech in America (1988).

growth in the protection of human autonomy, enabling people to direct the course of their lives through discourse.[34]

This worthy free speech tradition began in 1919 with *Schenck v. United States*[35] with rather inauspicious results.[36] In an opinion by Justice Oliver Wendell Holmes, the Supreme Court upheld restrictions on political speech, thereby quashing robust public debate at the exact point where the dominant powers feared political dissent might be most effective.[37] Indeed, if the government had not been motivated by fear—fear that individuals might begin to resist the draft, fear that criticisms of the war might capture popular thinking, and fear that dissent might generally disrupt the singular war effort—and, if political speech was incapable of changing beliefs and opinions, then it might have been easy to dismiss the rantings of dissent as harmless noise, the cacophony of confused minds. However, the government *was* motivated by fear, and speech does sometimes prove persuasive, even at the expense of truth.[38] Indeed, an ancient battle between the philosophers—guardians of the search for truth—and the sophists—guardians of rhetoric—resonated in this fear.[39] The state, seeking to maintain a monopoly on "truth," feared the persuasive force of rhetoric which, according to the state, could not possibly intimate truths.[40]

The free speech tradition, quite fortunately, veered from this precipitous path as a partial consequence of Holmes's subsequent dissents from the

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34. Kalven elegantly expresses the dialogic goal of the present Article:

> [T]here has been over the years at the level of the Supreme Court a sort of Socratic dialogue going on between the Court and the society as to the meaning of freedom of speech.... As with Socrates, the dialogue appears to be eternally open-ended—a definitive, fully understood answer will never be reached and so the process must go on with another and yet another question being put.

*Id.* at 23.

35. 249 U.S. 47 (1919) (Holmes, J.); *see also* Debs v. United States, 249 U.S. 211 (1919) (Holmes, J.).

36. Kalven, *supra* note 33, at 125 (noting that the tradition, had it followed Judge Learned Hand in his decision in *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), would "almost certainly have been better"). Judge Hand, construing the Espionage Act of 1917 at issue two years later in *Schenk*, engages in strict statutory construction in order to protect speech from the censor. *See Masses Publ'g Co.*, 244 F. at 537-40.

37. *See Debs*, 249 U.S. at 211. Eugene Debs, a Socialist Party leader who received nearly one million votes for President in 1912, was convicted of violating the Espionage Act of 1917 for comments deemed to incite others to obstruction of the draft. *Id.* at 212. The Court upheld his conviction and ten-year sentence on each count. *Id.* at 212, 216.

38. Fear that words might have detrimental effects on national morale or unity led to a number of convictions during the World War I era. The Court saw certain speech acts as tending to cause insubordination as a natural, though inchoate, effect of speech. *See* Frohwerk v. United States, 249 U.S. 204 (1919) (upholding a conviction under the Espionage Act); *see also* Gilbert v. Minnesota, 254 U.S. 325 (1920) (same); Pierce v. United States, 252 U.S. 239 (1920) (same); Schaefer v. United States, 251 U.S. 466 (1920) (same). *See generally* Geoffrey R. Stone, Perilous Times: Free Speech in Wartime 136-220 (2004).

39. For more on this classical debate, see Plato's *Gorgias* and *The Republic*.

40. See *infra* Part IV.B for more on truth as a value of free speech as enunciated by the "marketplace of ideas" theory.

precedents he authored in *Schenk* and *Debs v. United States*.[41] Speech began to win, not because of any necessary connection between content and truth, but because the Court began to recognize the value of exchanging ideas. This idea is encapsulated in Holmes's notion of a "free trade in ideas,"[42] language that has persistently captivated the imagination of the Supreme Court.[43] Judicial commitment to speech during times of perceived crises, however, continues to waver. For instance, the Court condoned the suppression of speech deemed politically threatening to the status quo during both the first "red scare" following World War I[44] and the second "red scare" of the early Cold War-McCarthy era.[45]

Censors can detract from the Court's ability to use the First Amendment to protect speech perceived to be dangerous. In opposing censorship, Justice William J. Brennan, Jr., observed, "[I]f the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security."[46]

Over time, however, the free speech tradition won many more victories over the power of the censor[47] in cases such as *New York Times Co. v. Sullivan*,[48] *Brandenberg v. Ohio*,[49] *Miller v. California*,[50] and *Texas v. Johnson*.[51] In each case, the domain of the censor was restricted, and the important place of speech in our political and individual lives was preserved as central to the functioning of a participatory democratic government. The

41. *See* Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting) (arguing, in an opinion joined by Justice Louis Brandeis, that absent a present danger, beliefs should be freely expressed because every idea is an incitement); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing the antidote to false ideas is more speech through "competition of the market"); *see also* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

42. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

43. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358 (2003); Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988); Brown v. Louisiana, 383 U.S. 131, 146 n.5 (1966).

44. *See, e.g.*, *Gitlow*, 268 U.S. 652 (upholding the conviction of a Socialist Party member for advocating criminal anarchy). After *Whitney* and *Gitlow*, the Court began to overturn convictions for subversive advocacy. *See, e.g.*, Fiske v. Kansas, 274 U.S. 380 (1927).

45. *See* Dennis v. United States, 341 U.S. 494, 509 (1951) (upholding convictions under the Smith Act, reasoning under Holmes's clear and present danger test that "the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited").

46. Greer v. Spock, 424 U.S. 828, 852 (1976) (Brennan, J., dissenting).

47. I do not mean to imply that there is some state of public discourse that is censorship-free. All speech is constrained in some way such that all speech is the product of censorship broadly conceived as constraint. As "use of the word *censorship* presupposes that censorship is a relatively identifiable subset of the set of human activity, then it makes no sense to identify as such a subset something that is part and parcel of all human activity." Frederick Schauer, *The Ontology of Censorship*, *in* Censorship and Silencing: Practices of Cultural Regulation 147, 149 (Robert C. Post ed., 1998).

48. 376 U.S. 254 (1964) (Brennan, J.).

49. 395 U.S. 444 (1969) (Brennan, J.).

50. 413 U.S. 15 (1973) (Burger, C.J.).

51. 491 U.S. 397 (1989) (Brennan, J.).

free speech tradition has proven itself worthy of protecting speech from the tentacles of the state censor; the Socratic dialogue over the meaning of free speech of which Kalven speaks continues.[52]

Despite the many successes of this most worthy tradition, the prohibition of content-based regulation has ossified speech under particular existing structures. There is considerable tension between what has evolved into the public forum doctrine and the other means by which speech is restricted through the regulation of place. With Justice Holmes sitting on the Massachusetts Supreme Judicial Court, place did not immediately find a home within the free speech tradition. Holmes wrote, "For the Legislature . . . to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[53]

Over time, however, place became part of the tradition. The free speech tradition rejected Holmes's early statement regarding place, developing a view that public fora "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[54] Under what became public forum analysis, place has had a rather inauspicious presence in both Supreme Court doctrine as well as in scholarly criticism, typically receiving limited review or attention.[55] To be sure, the public forum analysis originated deep within the free speech tradition. Kalven, in discussing *Cox v. Louisiana*,[56] which cautiously upheld the right of public protest, stated "that in an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are, in brief, a public form that the citizen can commandeer."[57]

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52. *See supra* note 34 and accompanying text.

53. Commonwealth v. Davis, 39 N.E. 113, 113 (1895). The U.S. Supreme Court affirmed the state court ruling in *Davis v. Massachusetts*, 167 U.S. 43, 48 (1897) ("The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.").

54. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939); *see also* Schneider v. New Jersey, 308 U.S. 147 (1939) (holding that an ordinance prohibiting distribution of leaflets on public property violates the First Amendment).

55. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994) (upholding an injunction against a buffer zone at a women's reproductive clinic); Ward v. Rock Against Racism, 491 U.S. 781 (1989) (upholding a noise restriction); Frisby v. Schultz, 487 U.S. 474 (1988) (upholding a regulation on picketing near a private residence); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (upholding a regulation on sleeping in a traditional public forum—a public park); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) (upholding a regulation on leafleting at a state fair); Grayned v. City of Rockford, 408 U.S. 104 (1972) (upholding regulations on noise from picketing near a public school); Adderley v. Florida, 385 U.S. 39 (1966) (upholding trespass conviction for protesters at a jail). *But see* United States v. Grace, 461 U.S. 171 (1983) (striking down a regulation against picketing in front of the Supreme Court).

56. 379 U.S. 536 (1965).

57. Harry Kalven, Jr., *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 11-12.

Yet the focus on speech, abstracted from its physical context, has shaped an attitude that is focused on the speech *act*. Consequently, there is relatively little concern for the regulation of the speech *place*. Indeed, given that the free speech tradition's focus has been on statutes like the Espionage Act of 1917,[58] which made it illegal merely to say certain words,[59] it is hardly surprising that the doctrine has been overwhelmingly concerned with speech acts. It is with this brief background that this Article now turns to the contemporary setting, where the censor is less concerned with words than with place.

### B. *The Contemporary Problem: Displacing Dissent*

As we have already observed, one way to regulate speech is to regulate the place it is uttered. For instance, in *Young v. American Mini Theatres, Inc.*[60] and *City of Renton v. Playtime Theatres, Inc.*,[61] the Supreme Court upheld city zoning ordinances targeting certain types of speech because of the ordinances' content neutrality, even though the ordinances severely limited the places in which otherwise protected speech might occur. The Court devised and relied upon a content-neutral theory of "secondary effects" to justify content-based zoning restrictions on adult theaters.[62] The secondary effects of low-value speech, such as adult films or nude dancing, generally include neighborhood decline and increased crime.[63] The effect of the ordinances in *Young* and *Renton* was to leave very little land on which such adult businesses could operate. In *Renton*, for instance, little more than five percent of the land within the city did not fall under the ordinance.[64] Despite this severe limitation on the place of otherwise protected speech, the Court analyzed the zoning restrictions as if they were ordinary time, place, and manner regulations[65] and concluded that the restrictions served a substantial governmental interest while allowing for

58. Act of June 15, 1917, ch. 30, tit. 1, 40 Stat. 217 (amended 1997).

59. Charles T. Schenk, for instance, violated the Espionage Act by, inter alia, denigrating the draft as "despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few" in leaflets distributed to military conscripts. Schenk v. United States, 249 U.S. 49, 51 (1919).

60. 427 U.S. 50 (1976).

61. 475 U.S. 41 (1986).

62. *Id.* at 47; *Young*, 427 U.S. at 71 n.34.

63. "The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views." *Renton*, 475 U.S. at 48; *see also* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002) (upholding a city ordinance banning more than one adult entertainment business in the same building); City of Erie v. Pap's A. M., 529 U.S. 277 (2000) (upholding a ban on public nudity on secondary effects grounds); Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991) (upholding Indiana's public indecency statute prohibiting nude dancing).

64. *Renton*, 475 U.S. at 53.

65. *Id.* at 53-54.

reasonable alternative avenues of communication.[66] Because the Court has never clearly articulated the difference between primary and secondary effects on speech,[67] it seems that many effects could be classified as secondary and, thus, permit the greater deference afforded content-neutral restrictions.[68] It is easy to imagine the government positing security and public safety concerns as legitimate secondary effects in order to justify otherwise content-based speech restrictions. Under this regime, content-neutral considerations validate many forms of place regulation, having the practical effect, as in *Renton*,[69] of eliminating the regulated speech from the public sphere. This regulatory permissiveness has created an ever-increasing reliance on special zoning regulations to suppress public speech and protest.

For example, recent Secret Service crowd control practices at public appearances by the President and other government leaders severely limit the free flow of public speech.[70] While supporters may congregate in full view of the President, Secret Service policy requires those who wish to protest to do so in "protest zones."[71] These "zones" are often out of sight of both the presidential motorcade and any of the participants at presidential events.[72] This policy has affected the peaceful protests of thousands of people at events across the country.[73] Although a number of protestors and would-be protestors have sued to enjoin the Secret Service's policy, none have succeeded, and the practice continues unabated.[74]

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66. *Id.*

67. One attempt to make sense of the doctrine reasons, "One may zone such speech or pass regulations that have the effect of restricting such speech if the rationale for the regulations is not to suppress the speech but instead to control effects that are not clearly forms of direct reaction to the speech." Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. Rev. 1135, 1150 (2003). Professor Shiffrin, however, does not think the distinction between primary and secondary effects is sensible. *See id.* at 1164-71.

68. Moreover, the Court is entirely unclear about what counts as reasonable alternative avenues of communication. *See* Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531 (9th Cir. 1993) (concluding cost is not a factor, but merely whether "any site is part of an actual market" for the regulated enterprise generally).

69. *See supra* note 64 and accompanying text.

70. *See generally* ACLU, Freedom Under Fire: Dissent in Post-9/11 America (2003), *available at* http://www.aclu.org/safefree/resources/17281pub20031208.html (follow "Download" hyperlink).

71. *Id.* at 11, 13.

72. *Id.*

73. *See Your Right to Say It . . . But Over There*, Chi. Trib., Sept. 28, 2003, § 2, at 3 [hereinafter *Your Right to Say It*].

74. The primary obstacle to gaining an injunction is demonstrating the prospect of imminent injury from the policy under the requirements of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *See* Acorn v. City of Philadelphia, No. 03-4312, 2004 U.S. Dist. LEXIS 8446, at *7 (E.D. Pa. May 6, 2004) (finding future threat of arrest at a presidential event too attenuated for injunctive relief); *see also* Elend v. Sun Dome, Inc., 370 F. Supp. 2d 1206, 1210 (M.D. Fla. 2005) (finding no threat of imminent injury sufficient for injunctive relief against "First Amendment zone" practices at a presidential event where the plaintiffs were arrested).

Prohibiting speech simply on the content or viewpoint expressed is facially unconstitutional.[75] A policy of restricting the speech of those who would protest presidential policies, if a simple matter of viewpoint restriction, would thus be presumptively invalid. But the policy is not strictly viewpoint discrimination. The Secretary of the Treasury has statutory authority under 18 U.S.C. § 1752 to "prescribe regulations governing ingress or egress to such buildings and grounds" where the President and his staff have "temporary residence."[76] The statute criminalizes entering or remaining in "any posted, cordoned off, or otherwise restricted area of a building or grounds where the President or other person protected by the Secret Service is or will be temporarily visiting."[77] The Secret Service's putative motivation is not political.[78] Its motivation is to protect the President, and those who are visibly protesting are said to provoke a greater security threat to the President. The protesters' point of view does not form the basis for the regulation; rather, speech restrictions are justified by the "secondary effects" that follow from their speech—secondary effects related to the prevention of crime, a core consideration in *Renton*.[79] It appears that by simply zoning speech to another place, speech is not suppressed but merely relocated so as to prevent potential criminal activity. The policy goes beyond simple viewpoint discrimination, because, on the surface, it is designed only to reach certain secondary effects. In reality, however, the application of such restrictions has a far more worrying effect.

Political protesters have confronted further restrictions on the place of their speech in the form of "demonstration zones" or "pens." Individuals and groups who wished to engage in political protest at the Democratic National Convention in 2004 sought an injunction in federal court against a "designated demonstration zone," which the district court described as "a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout,"[80] for which "[t]he overall impression created . . . is that of an internment camp."[81] In language that distanced the court from its decision, the district judge concluded that he could not "say that the design itself is not narrowly

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75. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 381-83 (1992); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

76. 18 U.S.C.A. § 1752(d) (2006).

77. *Id.* § 1752(a)(1)(ii).

78. Interestingly, when contacted by Salon.com to comment on the ACLU's suit, Secret Service spokesman John Gill claimed that "[t]he Secret Service is message-neutral," but never actually claimed that the protestors constitute a special threat. Dave Lindorff, *Keeping Dissent Invisible*, Salon.com, Oct. 16, 2003, http://dir.salon.com/story/news/feature/2003/10/16/secret_service/print.html.

79. *See* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986).

80. Coal. to Protest Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 66-67 (D. Mass. 2004).

81. *Id.* at 74.

tailored"[82] and denied an injunction seeking to prohibit the use of what he admitted conveyed "the symbolic sense of a holding pen where potentially dangerous persons are separated from others."[83]

On appeal, the protestors argued that they did not merely wish to express their ideas, but to interact face-to-face with delegates. In upholding the district court's decision, the First Circuit reasoned that, "although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access."[84] Moreover, "messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets."[85] This view requires that third parties carry the protestors' message, despite the Supreme Court's holding that third party media outlets cannot be forced to provide space on their venues for such messages.[86] Notably, the importance of place fails to enter into the analysis at all; when the First Circuit concluded that the district court did not err in finding that "viable alternative means existed to enable protesters to communicate their messages to the delegates,"[87] those means were evaluated without regard to place at all.

The other potential alternative cited by the First Circuit requires print and electronic media rather than the face-to-face interaction of a physical place.[88] Just as all media are not the same, not all places for speech are interchangeable; yet the court refused to recognize that where the participants speak is as important as what they say. Finally, by ignoring the particular role of place, as well as the importance of having space within an existing forum broadly conceived, the court engaged in the following balancing act: "On the one hand, freedom of expression, especially freedom of political expression, is vital to the health of our democracy. On the other hand, making public safety a reality and ensuring that important political events are able to proceed normally are also valuable."[89] Implicit in this judicial bromide is the idea that "important political events" can only "proceed normally" in the absence of any visible dissent. Moreover, "freedom of political expression," so "vital to the health of our democracy,"

82. *Id.* at 75.
83. *Id.* at 74-75.
84. Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 14 (1st Cir. 2004).
85. *Id.*
86. *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (holding that a public television station cannot be required to provide space for a speaker it deemed a nonviable candidate for a congressional seat); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (holding that a newspaper cannot be required to provide space for the expression of candidates' views).
87. *Bl(a)ck Tea Soc'y*, 378 F.3d at 14.
88. *Id.*
89. *Id.* at 15.

is not connected at all to normal politics, but is a freedom to be exercised "over there," invisible and inaudible to the public. At the Democratic National Convention, government regulation of place succeeded in suppressing speech. Because the place was so forbidding, no speakers were willing to go there in order to express their ideas.[90]

Zoning the place of speech in this manner has not been uniformly and absolutely upheld. In 2000, a district court enjoined the City of Los Angeles from establishing a secured protest zone that was out of the sight line of delegates attending the 2000 Democratic Convention.[91] The court held that the city's placement of the zone was not narrowly tailored to serve a legitimate government interest and that the area did not provide adequate alternative channels of communication.[92] In another small concession to political speech in the public sphere, another district court issued a preliminary injunction against New York City for its use of holding "pens" to contain demonstrators at the 2004 Republican National Convention.[93] In anticipation of widespread protests, the pens were placed along multiple city blocks with each holding approximately 4000 people. Once people were inside the pens, the city generally did not allow them to exit for bathroom breaks. Also, if the police allowed a person to exit one pen, they would force the person to enter another pen on her return. The city justified the use of such pens on safety and security grounds.[94] Although the court "enjoined [the New York Police Department] from unreasonably restricting access to and participation in demonstrations through the use of pens,"[95] no particular action was required of the city, and the use of such pens was not itself questioned. Instead, the court considered only the manner in which the pens were used.[96] Remaining free to construct oppressive architectures to suppress dissent, city officials needed only to adjust the manner in which they controlled the use of space in order to control the dissenting speech.[97] There was no need to rethink their manipulation of place in order to control speech.

In all of these cases and practices, the effect is the suppression of speech through the supposed content-neutral regulation of place.[98] Although the

90. *See* Kifner, *supra* note 9.

91. Serv. Employees Int'l Union, Local 660 v. City of Los Angeles, 114 F. Supp. 2d 966, 975 (C.D. Cal. 2000).

92. *Id.*

93. Stauber v. City of New York, 03 Civ. 9162, 03 Civ. 9163, 03 Civ. 9164, 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 19, 2004).

94. *Id.* at *4.

95. *Id.* at *95.

96. *Id.* at *76-*81.

97. Architectural control of place, and the spaces that constitute a particular place, is an effective means of asserting state power without appearing to censor speech. Nonetheless, architecture *is* a means of control, as Michel Foucault famously argued using the example of Jeremy Bentham's panopticon. Michel Foucault, Discipline and Punish: The Birth of the Prison 200 (Alan Sheridan trans., 1977).

98. Even where there is a putative underlying court victory on the behalf of speakers, as in *Stauber*, speech is often suppressed in other ways at the sites where persons seek to speak.

Supreme Court considered the dislocated speech at issue in *Renton* to be "low value" speech, the speech dislocated in these more recent cases and practices is core political speech. Moreover, the very nature of public appearances aimed at communication is that speakers are able to encounter other persons with whom they wish to speak. As Harry Kalven aptly puts the point, "Among the many hallmarks of an open society, surely one must be that not every group of people on the streets is 'a mob,' and another that its streets time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[99]

Sterilized public spheres do not allow citizens to encounter each other as free and autonomous persons capable of exchanging ideas and discussing the issues of the day.[100] If the significance of place does not feature in the values thought to ground the First Amendment, and if place is doctrinally relegated to mere content-neutral zoning, then public places may be safe and secure, though free from speech.

The following part considers the values grounding free speech, and in the parts that follow, this Article traces the doctrinal failure of the Supreme Court to consider the importance of place in relation to traditional First Amendment values.

## II. THE PROBLEM WITH FIRST AMENDMENT THEORY

Theory in First Amendment discussion is often taken to provide a "core value" by which courts and commentators can measure a particular regulation, prohibition, or limitation of speech and conduct.[101] After identifying a core value, a court can apply doctrinal analysis to the particular circumstance to yield a constitutional answer. We might call this a "doctrinal syllogism." Professor Stanley Fish portrays it as a "two-step" dance: "The first step was to identify the essence or center of First Amendment freedoms; the second step was to devise a policy that protected and honored the center so identified."[102] Questions about the role of theory have led some, including Fish, to abandon the very idea of achieving a

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For example, many protesters were arrested on the streets during the 2004 Republican National Convention. *See* Michael Slackman & Diane Cardwell, *Police Tactics Mute Protesters and Messages*, N.Y. Times, Sept. 2, 2004, at A1.

99. Kalven, *supra* note 57, at 32 (internal quotation marks omitted).

100. The problem here is not that persons will separate themselves from other human beings in an excessive form of individualism. As Cass Sunstein speculates, "Public forums make it more likely that people will not be able to wall themselves off from their fellow citizens. People will get a glimpse, at least, of the lives of others, as for example through encountering people from different social classes." Sunstein, *supra* note 22, at 33. Rather, the problem here is that the state may itself wall citizens off from their fellow citizens.

101. Jed Rubenfeld writes, "Giant-sized First Amendment theories tend to start with one or both of two giant-sized ideas: either democracy or individual autonomy." Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 Yale L.J. 1, 30 (2002).

102. Stanley Fish, The Trouble With Principle 116 (1999).

single overarching theory to guide First Amendment jurisprudence.[103] Fish has a point; the plethora of theory inevitably leads us back to particular practices and policies in which the First Amendment is implicated—though it is always difficult to say what overarching value takes precedent. The failure to determine what single value underlies the First Amendment does not, however, entail that the theory is not useful in helping to clarify some of the underlying issues involved when applying the Free Speech Clause. Although canvassing all of the potential theories of the First Amendment is beyond the scope of this Article, it is useful to understand the arguments of two particular approaches to the First Amendment: autonomy and democracy.

### A. *The Value of Autonomy*

Many commentators rely on a conception of autonomy to justify theories of First Amendment jurisprudence. What gives the First Amendment such a central place in the public's imagination and in the Court's doctrine is its presumed connection to basic human autonomy and liberty.[104] Answering to theory and policy, First Amendment jurisprudence should protect the core moral and political value of autonomous self-expression, quite irrespective of any desired consequential outcomes. One version of this approach is found in Martin Redish's advocacy of the one true First Amendment value of "individual self-realization."[105] This value develops the individual's powers and ability to control his or her future through making substantive choices about that future. Democratic values, because they are merely instances or outgrowths of the one fundamental value of "self-realization," provide only one way in which those values might be manifested.[106] Other advocates of the libertarian value of self-expression focus on the individual's right to non-interference, the individual's right to receive information, and the individual's fundamental right of free choice.[107] These "expressive" theories focus on the need for fully formed

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103. *Id.*

104. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (noting "the fundamental rule of protection under the First Amendment[] that a speaker has the autonomy to choose the content of his own message").

105. Martin H. Redish, *The Value of Free Speech*, U. Pa. L. Rev. 591, 593 (1982).

106. *Id.*

107. *See, e.g.*, C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. Cal. L. Rev. 979, 998 (1997) ("[L]iberty is a (legal) capacity to make choices about behavior."); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 879 (1963) ("The right to freedom of expression . . . derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being."); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204, 222 (1972) ("[T]he authority of governments to restrict the liberty of citizens in order to prevent certain harms does not include authority to prevent these harms by controlling people's sources of information to insure that they will maintain certain beliefs."); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 335 (1991) (arguing that freedom of speech is designed to protect autonomy

autonomous agents to realize their autonomy through public expression of their ideas. The protection of free expression by the First Amendment is protection of the important value found in the individual capacity to express ideas, opinions, and perspectives. If the state suppresses speech, the state inhibits the self-expression thought to be essential to the exercise of personal autonomy.

A version of autonomy is often at least the implicit, if not explicit, justification for the Supreme Court's content-neutrality analysis. Consider the Court's decision in *Buckley v. Valeo*,[108] in which the Court struck down central provisions in campaign finance laws designed to correct imbalances in the realization of autonomy. The Court noted, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."[109] The Court was only concerned about the ability to identify a separation between individuals, and claim neutrality between them. "[S]ome elements" are distinct from the "relative voice of others," and hence no further inquiry is needed.[110] The philosophical justification remains implicit: It would violate the liberty or self-realizing autonomy of "some" in order to promote the substantive capacities of "others," and such violation of procedural autonomy is never warranted, no matter the substantive inequities that might result. "Wholly foreign" goes beyond epistemic notions of warrant to suggest that it cannot even be recognized as the relevant kind of reason at all; one might as well be advocating gobbledygook.

Quite divorced from democratic ideals, the expressive value of speech as an end in itself leads to clashes of expression. Racist speech is notorious for producing such conflicts.[111] The autonomy of those expressing racist viewpoints stands in opposition to their targets' desire to avoid the harm in being subject to that expression. The harm for the autonomy of the target is in the denigration of her self-conceptions and the opportunity to foster her own self-expression.[112] However, if, for instance, campus speech codes are enacted to prohibit racist speech on campus, the individual who wishes to express her disfavored views now has her autonomy and right of self-expression suppressed.[113] This opposition arises most notoriously when a

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and that "the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful").

108. 424 U.S. 1 (1976).

109. *Id.* at 48-49.

110. *Id.*

111. *See, e.g.*, Virginia v. Black (*Black II*), 538 U.S. 343 (2003); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 Wm. & Mary L. Rev. 267, 312-17 (1991).

112. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989).

113. Arguing against such codes and for the fundamental value of self-expression, Baker suggests, "The speaker typically views her own expression as a manifestation of autonomy; the speech presents or embodies her values." Baker, *supra* note 107, at 990; *see also* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L.J. 484.

Ku Klux Klan member wishes to express solidarity with fellow bigoted travelers by imposing harm on others through acts of self- and group-expression.

To preserve the value of self-expression in First Amendment disputes, a court must vigilantly protect autonomy against the power of the state to censor, up to a limit when the harm turns from denigration to intimidation. The Supreme Court in *Virginia v. Black* balanced the self-expression rights of the Klan against the harm of intimidation suffered by the targets of that speech.[114] This case was somewhat surprising. The Virginia Supreme Court had treated the cross-burning statute as clearly analogous to the St. Paul, Minnesota, ordinance struck down in *R.A.V. v. St. Paul.*[115] Yet, the U.S. Supreme Court was willing to weigh the value of self-expression against the harm of intimidation created by the acts of putative self-expression.[116]

The central ideal of autonomy is that there is a core self that manifests its preexisting autonomy through speech. Any interference with speech is thus interference with the exercise of autonomy. Because autonomy is a fundamental value of liberty,[117] state intrusion on autonomy can seldom, if ever, be justified on democratic principles. There are two versions of arguments for autonomy as a fundamental value: (1) arguments that reduce all other values to the value of self-expression, deriving some ontological priority of the self antecedent to the self's social and political commitments;[118] and (2) arguments for protecting autonomy as the only way to protect and further deliberative democracy because there is no principled way to violate the autonomy of some to promote that of others.[119]

Richard Fallon makes a perceptive and useful distinction within autonomy between what he calls descriptive autonomy and ascriptive

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114. The Court provided a lengthy history of the Klan's use of cross burning to establish the contextual meaning of the intimidation and harm caused by cross burning. By contrast, the Court recognized the possibility of a purely expressive use of cross burning that is protected. The Court wrote, "[W]hile a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives. And when a cross burning is used to intimidate, few if any messages are more powerful." *Black II*, 538 U.S. at 357. Moreover, when cross-burning is used to intimidate, it is no longer self-expression, but a proscribable threat.

115. Black v. Commonwealth (*Black I*), 553 S.E.2d 738, 742-44 (Va. 2001) (citing R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)).

116. *Black II*, 538 U.S. at 362-63.

117. *See* Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.").

118. *See* Baker, *supra* note 107, at 992 ("Respect for personhood, for agency, or for autonomy, requires that each person must be permitted to be herself and to present herself."); Redish, *supra* note 105.

119. Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 Ethics 654, 672 (1993) ("Citizenship thus presupposes the attribution of freedom. The ascription of autonomy is in this sense the transcendental precondition for the possibility of democratic self-determination.").

autonomy.[120] Descriptive autonomy captures the ways persons possess critical and self-critical ability, competence to act, sufficient options to exercise our capacity to act, and independence from coercion and manipulation. These features of our autonomy can exist to a greater or lesser extent, and their existence suggests the possibility for the development of a greater degree of autonomy.[121] By contrast, ascriptive autonomy captures the metaphysical sovereignty we each possess over our personhood. Ascriptive autonomy is an absolute.[122] The problem, as Fallon argues, is that descriptive and ascriptive autonomy frequently pull in opposite directions, resulting in a severe analytical limit on the usefulness of autonomy as a First Amendment value.[123] In the end, Fallon doubts that autonomy, as a First Amendment value, "sharply clarifies many ongoing debates or yields clear prescriptions for many disputed issues."[124] Accordingly, the value of autonomy, as a matter of jurisprudential theory, may not, in the end, amount to much when addressing particular First Amendment disputes.

The failure of autonomy theory to clarify the issues faced by policies such as "protest zones" could not be clearer. In itself, neither descriptive nor ascriptive autonomy is threatened by dissent being expressed in cordoned-off areas out of sight of the President or other attendees to presidential events. Somewhat cynically, one might argue that the self-expressive value of free speech is being satisfied. The protestors are allowed to voice their dissent, and even to do so in "public." They are merely denied their chosen forum and restricted in their access to a desired audience—features not in themselves guaranteed by the First Amendment.

This discussion suggests that there are two additional conceptions of autonomy at play. Both Fallon's ascriptive and descriptive notions of autonomy are examples of what I call "procedural autonomy." Procedural autonomy considers the individual to be a functional placeholder for such values as freedom of choice, personal self-determination, self-realization, liberty, or self-identification. "Substantive autonomy," on the other hand, points to the value of speech in promoting collective self-determination and speaks to the qualitative aspects that go into creating the individual identity of a human being, qua human being, capable of encountering other humans

120. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 Stan. L. Rev. 875 (1994).

121. *Id.* at 880-90.

122. *Id.* at 890-93.

123. *Id.* at 893-901. Even worse, autonomy is also conceptually implicated in the division between negative and positive conceptions of liberty. Versions of negative liberty stress noninterference with the actions of an autonomous agent by a political body, whereas versions of positive liberty are concerned with enabling autonomous agents to realize their freedom through actions fostered by particular kinds of political arrangements. *See, e.g.*, Isaiah Berlin, Four Essays on Liberty (1970); Charles Taylor, *What's Wrong with Negative Liberty?*, *in* 2 Philosophy and the Human Sciences: Philosophical Papers 211, 213 (1985) (distinguishing freedom as an "exercise-concept" in which one determines for oneself the shape of one's life and freedom as an "opportunity-concept" in which we are permitted to act irrespective of the existence of enabling conditions).

124. Fallon, *supra* note 120, at 902.

in public space. The former does not concern itself with the capabilities, capacities, and potentialities for the realization of the individual human being through engagement with other human beings; it treats autonomy as something that is antecedent to encountering other persons in public space. In this sense, public place is merely the location for self-expression. The latter eschews the possibility of realizing a fully formed autonomous human life because self is only developed through interaction with other human beings. Here, public place is essential for encountering others and, therefore, developing a sense of self. Substantive autonomy is associated with the value of public deliberation, the second "grand theory" fundamental free speech value.

### B. *The Value of Deliberation and Collective Self-determination*

Although the value of autonomy features prominently in First Amendment scholarship, many argue that the core aim of the First Amendment is not to protect autonomy itself, but to protect political speech to further the democratic value of collective self-determination. This approach takes its judicial nod from Justice Brennan, who wrote for the Court in *Garrison v. Louisiana* that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[125] The most virulent form of this approach, as advocated by Robert Bork, calls for the protection of speech only to the extent that it promotes political autonomy, which is limited to choices related to matters of government policy, behavior, and personnel.[126] Professors Harry Kalven and Alexander Meiklejohn have famously advocated less strained accounts of the First Amendment value of promoting political speech.[127] In order to exercise our right to self-governance, we need to engage in public discussions about public issues understood broadly. To the extent that autonomy is protected on such accounts, it is protected as an instrumental value only insofar as it furthers democratic self-determination. Genuine choice requires information, and, thus, speech is protected in order to enable informed choice.

As a prominent critic of pure autonomy theories, Professor Owen Fiss explains how such theories are insufficient when compared with those that advocate some version of protecting public exchange.[128] One problem is that, in a society with unequal distributions of social goods, protecting autonomy will promote a debate that reflects the structure of the status quo; this will tend to skew debate to reflect dominant interests. If "neutral"

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125. Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

126. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 27-28 (1971).

127. *See generally* Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Harry Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191.

128. *See* Owen M. Fiss, *Why the State?*, 100 Harv. L. Rev. 781, 786 (1987) [hereinafter Fiss, *Why the State?*]; *see also* Owen M. Fiss, The Irony of Free Speech (1996).

principles promote only the existing structure, then we will not have robust and pluralistic public debate. To counter this limitation of the libertarian autonomy model, Fiss promotes the "public debate principle" as an alternative. The public debate principle requires government officials to examine the quality of the public debate and intervene in the "market" to ensure an "uninhibited, robust, and wide-open"[129] discussion of all public issues.[130]

A fundamental debate thus rages between two First Amendment values: autonomy and the "public debate principle." One benefit of protecting autonomy is to achieve the political and moral ideal of collective self-determination. Cass Sunstein and Owen Fiss deny that protecting autonomy alone is sufficient to achieve collective self-determination; instead, they advocate for the value of protecting "public debate" or deliberative democracy.[131] These latter values involve an active role for the state in positively promoting, not merely negatively protecting, speech for speakers and listeners alike. As Sunstein notes, "One goal of a democracy, in short, is to ensure autonomy not merely in the satisfaction of preferences, but also, and more fundamentally, in the processes of preference formation."[132] Active intervention in the "marketplace of ideas" in ways that may affect autonomy can only be an anathema to advocates of the theory that the First Amendment works to protect autonomy.

Because, in this view, deliberation, not mere self-expression, is the core value of the First Amendment, there is a need for the government and courts to protect processes of collective self-determination. The very idea of determination requires goal-oriented decision making that constitutes reflective, considered judgments weighing all available information and perspectives.[133] Of course, the idea of determination will always be something of a regulative idea. Humans lack both sufficient access to information and the time and attention necessary to digest the full range of available perspectives and considerations. Determination can never itself be a rail, extending our decisions automatically before us.[134]

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129. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

130. Fiss, *Why the State?*, *supra* note 128, at 785-87.

131. *See, e.g.*, Cass R. Sunstein, Democracy and the Problem of Free Speech (1995); Owen M. Fiss, *State Activism and State Censorship*, 100 Yale L.J. 2087 (1991).

132. Cass R. Sunstein, *Preferences and Politics*, 20 Phil. & Pub. Aff. 3, 12 (1991).

133. This position is far from controversial within First Amendment Theory. For example, Robert Post sees autonomy, not as mutually entailing, but as a limit to collective self-determination: "[T]he concept of autonomy must function within public discourse as a moral ascription that marks the boundaries of our commitment to democratic self-government." Post, *supra* note 119, at 673; *see also* Fiss, *supra* note 28, at 1410; Post, *supra* note 28, at 1523.

134. The concept of procedural autonomy seems to entail that self-determination is something that is done by the self prior to engaging with others. Thus if we know the self, all is already determined. This idea has an analogue to a view of rule following that Wittgenstein rejects: "If we know the machine, everything else, that is its movement, seems to be already completely determined." Ludwig Wittgenstein, Philosophical Investigations § 193 (G. E. M. Anscombe trans., 2d ed. 1958).

Determination, rather, always includes the possibility of something new—the possibility of interrupting the expected.

The focus on collective self-determination underscores the need for autonomy to promote deliberation. The central value is interpersonal deliberation. But, for this theory, there are no substantive commitments to how that deliberation is managed or where it takes place. Deliberation need not occur in public fora. Thus, we see that neither theory—autonomy nor deliberation—protects the importance of place. It is as if expression or deliberation were completely detached abstractions. Perhaps the very idea of deliberation would seem to entail a robust conception of the role of place. But deliberation can occur in many forms, such as over the Internet, and dissent, as recent Secret Service policy attests, can be silenced or removed to a remote place.

Thus, to develop ways of thinking that enhance the role of place in First Amendment theory and policy, we must look to fresh insight. Though, with Stanley Fish, I do not want to suggest that we need a "two-step" theory or what I call a "doctrinal syllogism."[135] Recall that one step is to identify the core First Amendment value, and the second is to advocate policy to further that value.[136] By recognizing the importance of substantive autonomy or democratic deliberation, we will not necessarily be able to engineer specific outcomes in concrete free speech cases. There is a difference between positing a core value for free speech from which we can deduce specific doctrine, and developing values that "We the People" want to see furthered through our agreement on the important constitutional principle of free speech. We articulate and defend particular free speech values in order to shape judicial vision and practice and to give direction and location to shared social practices and forms of social structure.[137] It is in service of this latter method that we look to the political theory of Hannah Arendt.

Arendt, in contrast to the approaches canvassed so far, connects both the very possibility for the formation and appearance of autonomous selves and the role of public deliberation to the need for place. Although critics and courts have tended not to view the First Amendment values of autonomy and deliberative democracy as fundamentally connected to notions of place, Arendt suggests otherwise. We now turn to her emphasis on the place where the political may become visible in public space and place.

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135. Additional criticisms of the role of theory are found in Stanley Fish, *Theory Minimalism*, 37 San Diego L. Rev. 761, 775-76 (2000). Fish defines theory as "an abstract or algorithmic formulation that guides or governs practice from a position outside any particular conception of practice." Stanley Fish, Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies 378 (1989).

136. Fish, *supra* note 102, at 116.

137. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 Stan. L. Rev. 1249, 1255 (1995) (noting that speech occurs in "the social contexts that envelop and give constitutional significance to acts of communication").

## III. THE APPEARANCE OF AUTONOMY: HANNAH ARENDT AND THE PLACE OF SPEECH

Many writers who focus implicitly on autonomy and self-determination do not directly employ these concepts.[138] For example, Professors Harry Frankfurt and Charles Taylor both develop accounts of the role of second-order reflection on the desires and choices one makes.[139] Though neither employs the concept of autonomy, both capture an important component of autonomy: the necessity of exercising our reflective capacity to accept or reject ideas, opinions, and projects.[140] For our purposes, such reflective capacity is important to the political realm because, without access to engagement with and exchange of ideas, the material about which one might exercise that capacity is limited, and so too is the development of personal autonomy. Hannah Arendt's political theory provides an important way for the free speech tradition to understand the possibility for a full reflective human life lived in public engagement with others.[141] This possibility is inherently tied to the need for place.

### A. *The Place of Appearances*

Hannah Arendt, in response to the terror of totalitarianism and the emergence of new forms of evil found in the apparent everyday world of rather ordinary bureaucrats, is most concerned with understanding and protecting the world of appearances.[142] For Arendt, in opposition to the philosophical tradition of Plato, the real world is the world in which things appear, not the hidden world of reality underlying appearances. To discern the supposed "real" world, one needs special, philosophical analysis, whereas to understand the world of appearances one needs only freedom to act and react. The world of appearances is the world in which human actions occur, and "action" in Arendt's particular meaning creates the shared political world we inhabit with fellow human beings.[143] Action is

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138. And still others, such as Joel Feinberg, conclude that the concept lacks a coherent, unified meaning. Joel Feinberg, 3 The Moral Limb of the Criminal Law, Harm to Self (1986). *See generally* John Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 Ethics 109 (1988).

139. *See* Harry Frankfurt, *Freedom of the Will and the Concept of the Person*, 68 J. Phil. 5 (1971); Charles Taylor, *Responsibility for Self, in* The Identities of Persons 281 (Amélie Oksenberg Rorty ed., 1976).

140. The central idea here is that autonomy is bound up with making beliefs, in a sense, "mine." I argue that beliefs can be "mine" in a relevant and meaningful sense only if they are the product of public engagement with others.

141. Kant tied enlightenment to the "freedom to make public use of one's reason in all matters." Immanuel Kant, *An Answer to the Question: What Is Enlightenment?, reprinted in* Political Writings 54, 55 (Hans Reiss ed., 2d ed. 1991).

142. *See* Hannah Arendt, Between Past and Future: Eight Exercises in Political Thought (1977) [hereinafter Arendt, Between Past and Future]; Hannah Arendt, The Human Condition (1958) [hereinafter Arendt, The Human Condition]; Hannah Arendt, The Origins of Totalitarianism (New ed. 1973). *See generally* John McGowan, Hannah Arendt: An Introduction (1998).

143. Arendt, The Human Condition, *supra* note 142, at 175-88.

what reveals human identity, an identity that is not fully formed prior to one's acting. The capacity for spontaneity means that a person's identity is always in the process of developing in its disclosure before other human beings. "This disclosure of 'who' in contradistinction to 'what' somebody is . . . is implicit in everything somebody says and does."[144] Arendt eschews the need to provide an account of anything so rigid as "human nature." Instead, she develops an account of the "human condition," which is determined through human interaction in and with a shared world. Part of this shared world is the human condition of "natality"—the capacity to initiate something new in the world through action. Furthermore, "[i]n this sense of initiative, an element of action, and therefore of natality, is inherent in all human activities."[145] Acting is setting something in motion, and this is always the beginning of something new that has not yet appeared before in the world.

The condition of natality means that the shared human world constituting our human condition need never be static.[146] The possibility of something new appearing through human creativity prevents the future from being fully determined by the past. Arendt's discussion of the condition of human autonomy manifests important philosophical underpinnings for the free speech doctrine and for the place speech occupies in actualizing human identity. Speech is a vital form of action necessary for not only disclosing human identity, but also for creating the shared political world. It is not just that humans reveal that they are distinct from each other, but that "[s]peech and action reveal this unique distinctness."[147] Indeed,

> [a]ction and speech are so closely related because the primordial and specifically human act must at the same time contain the answer to the question asked of every newcomer: 'Who are you?' This disclosure of who somebody is, is implicit in both his words and his deeds . . . . Speechless action would no longer be action because there would no longer be an actor, and the actor, the doer of deeds, is possible only if he is at the same time the speaker of words.[148]

Speech thus is of fundamental philosophical importance because it constitutes a necessary condition for the development of human identity. This development comes about only in the world of appearances, where we are revealed to others such that speech becomes necessarily dialogic.

In the exchange of speech, in the presence of ours and other persons' actions, we become fully human. Thus, philosophically speaking, free speech is vital not just to a collective political world (which it certainly is) but also for each person's development and disclosure of his or her identity. Free speech has a special place in constitutional jurisprudence because

144. *Id.* at 179.
145. *Id.* at 9.
146. *Id.* at 7-11.
147. *Id.* at 176.
148. *Id.* at 178-79.

speech plays a central role in personal identity.[149] The disclosure of personal identity is not, to repeat, a matter of esoteric and individual interest, but is of interest to all, for in that disclosure a shared political world is created and fostered. Advocates of autonomy in the libertarian tradition wish to make a distinction between a fully formed antecedent human identity who appears before and retrenches from the public, political world. Arendt provides a compelling, alternative account of the impossibility of making that distinction—of driving a wedge between personal and political identity.

For humans to disclose and create their identity, there must exist a public space for appearing for oneself and to others. Arendt claims that the "public" denotes two related phenomena: "It means, first, that everything that appears in public can be seen and heard by everybody and has the widest possible publicity. For us, appearance . . . constitutes reality."[150] Second, "the term 'public' signifies the world itself, in so far as it is common to all of us and distinguished from our privately owned place in it."[151] The human condition is one of plurality in which each person inhabits a world with many other persons, and "this plurality is specifically *the* condition . . . of all political life."[152] But there is no world independent of the appearance of those persons in creating the condition of political life. Because a robust existence of the political world depends on the plurality of perspectives, "[t]he end of the common world has come when it is seen only under one aspect and is permitted to present itself in only one perspective."[153] This idea—that the common world constitutes the world of appearances wherein individuals create their identities—is central to understanding how both autonomy and deliberative democracy depend upon the role of place. It is not just the quality of public debate that is at issue, but the very reality of anything appearing *as* public, political debate where different persons can see, hear, and speak to other persons. This reality is necessarily dialogic, depending on multiple perspectives and appearing in multiple aspects. Arendt notes that "the reality of the public realm relies on the simultaneous presence of innumerable perspectives."[154]

Like the events of the twentieth century to which she is responding, Arendt argues against the negative liberty tradition that considers rights and autonomy as necessarily prior to and separate from the engaged world of political appearance.[155] Arendt's thoughts not only provide an alternative conception of autonomy, but also call attention to the role of serendipity and public encounters that might interrupt settled patterns of political life in

149. To put the point in Alasdair MacIntyre's terms, "[M]an is in his actions and practice, as well as in his fictions, essentially a story-telling animal." Alasdair MacIntyre, After Virtue: A Study in Moral Theory 201 (1981).

150. Arendt, The Human Condition, *supra* note 142, at 50.

151. *Id.* at 52.

152. *Id.* at 7.

153. *Id.* at 58.

154. *Id.* at 57.

155. *See* Arendt, Between Past and Future, *supra* note 142, at 143-71.

positive ways. First, Arendt argues that the idea of individual freedom in the inner life of the will—a concept necessary for the libertarian account of individual identity existing prior to political life—cannot adequately account for freedom.[156] If freedom is so self-contained, then it would be entirely consistent with tyranny because freedom would be analytically independent of the "outward" modes of political existence. Second, tyranny, Arendt argues, is inconsistent with freedom precisely because the appearance of human freedom conceptually and analytically requires a public space of appearance.[157] In this space, the historical, the traditional, the natural, and the automatic are all "constantly interrupted by human initiative."[158] For Arendt, freedom is what emerges from human action in public space and is not something reserved to the private "inner" realm of consciousness formed in isolation from the common linguistic and political world. Thus, in order to protect human freedom, we must protect the capacity for human action to appear as something new in the world. We must protect the process of interrupting settled patterns of a shared political life, lest we risk stagnating into freedom-stifling social structures.

In order to achieve this end of protecting the possibility of human freedom as an expression of human identity through speech and action, First Amendment jurisprudence must foster spaces and places for such appearances. The issue of space is contained in the Court's media access decisions which have stumbled along primarily in reliance on two general principles: (1) that regulation of speech must be content-neutral; and (2) that maintaining supposed "neutral" markets for speech—a kind of negative, laissez faire, approach to regulation—is sufficient to protect speech from abridgement. The issue of place is found in the Court's "public forum" analysis, particularly regarding the public role of privately owned shopping centers and airports. I shall discuss each issue in turn.

### B. *The Language of Dissent*

Language itself is often a source of controversy. The ability to make meaning is the ability to create and define social and political reality.[159] In the 1990s, Americans debated over the language of "political correctness." The controversy was over who gets to control the meanings of words. Americans also disagree on the use of marked language to construct gender difference.[160] People also dispute whole narratives such as the O. J. Simpson trial and verdict. These controversies over uses of language define individual perspectives, and define common cultural experience. One reason the "political correctness" cacophony resonated so fiercely on both

156. *Id.* at 146-49.
157. *Id.* at 170.
158. *Id.*
159. *See generally* Robin Tolmach Lakoff, The Language War (2000).
160. *See id.*

the left and right is that it made manifest the notion that the one who could control meaning could control social and political reality.

To use broad political generalizations, both the political right, which opposed campus regulations of hate speech and other trappings of "political correctness" on First Amendment grounds, and the political left, which supported such speech regulations on Fourteenth Amendment grounds, seemed to agree on the proposition that meaning matters. And meaning matters precisely because the ability to control language is the ability to control aspects of reality. Both sides of the debate implicitly accepted that meaning is a product of social practices. Only if a change in words and meaning could change practices and perceptions would any party to the debate bother to holler so loudly.

What is the source of this thought that meanings are connected to practices in such a way as to play a constitutive role in human life? Commentators have focused on the role of ordinary language since the writings of Ludwig Wittgenstein on the topic in the first half of the twentieth century. Relevant to the purposes of this Article, Wittgenstein introduces the idea of a language game to focus the connection between speech and action: "Here the term 'language-*game*' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life."[161] "Form of life" is a technical term meant to convey the multiplicity of both possible ways of living and possible ways of seeing and responding to the world. The ability to speak a language is the ability to engage in practices within a form of life in which that language has meaning. To speak is to have a perspective on the world, to master how to follow the rules within a practice, or to be open to new ways of seeing the world through encounters with the perspectives of other persons. Speech matters because it is through language that we construct a world through our interactions and cooperative practices with other human beings with whom we share this "complicated form of life."[162] Indeed, agreement in practices is necessary for language to have meaning: "If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments."[163] Agreement in use of language is the common calculus by which we are able to understand each other and to coordinate our lives, and such agreement suggests that a robust exemplification of a form of life is what occurs in public space. Because of the very public nature of meaning, public use and control of language *is* highly contentious.

To restrict speech, according to Arendt, is to restrict human practice, to diminish a form of life. Language and speech particularly matter to *our* form of life because it is in and through them that we engage the world and other human beings. The loss of language can occasion the loss of a

161. Wittgenstein, *supra* note 134, § 23.
162. *Id.* § i.
163. *Id.* § 242.

perspective of the world. Language works to create shared meaning, and in so doing, to construct human practices and perceptions.[164] Language also shapes how we respond to other human beings, actions, events, and things in the world. For example, the fight over political correctness or the recognition of the harms of racist speech highlight the profound importance of speech in creating a shared world.[165] Although it is beyond the scope of this Article to defend the philosophical accuracy of Wittgenstein's ordinary language philosophy, his account of language does provide widely accepted reasons to think that language matters to everyday life—not only because language is a means of communication, but also because it is a way of constituting identity and social relations. If there were not a shared recognition of this latter assertion, language would not engender such debate.

By shunting dissent off to the disappearing margins of society, there is an implicit recognition of the power of language. When citizens brandishing signs with messages such as "Cheney—19th C. Energy Man,"[166] "Welcome Governor Bush,"[167] or "Instead of War Invest in People"[168] are shunted off to "protest zones," there is not only an issue of place, but of language. Such slogans do not obviously have the meaning of protest. Nor does wearing a shirt that says "Give Peace a Chance"[169] or even carrying a jacket that says "Fuck the Draft."[170] To categorize such language as dissent or as protest is already an attempt to control it, to say this language is "in protest," and not merely "in communication." Such language is just as easily an expression of group solidarity as it is a protest against another group. Labeling language as "protest" or "dissent" is an attempt to control its meaning and how it will be read.

Dissent opens up the possibility of change and challenges existing conceptions. As such, it is a particularly vulnerable characterization of speech, precisely because it does not appear as the ordinary and everyday. Once speech is labeled as "dissent," why would "We the People" wish to protect it? John Stuart Mill lamented the loss of dissent, because, by suppressing dissenting opinions, we "are deprived of the opportunity of exchanging error for truth."[171] Following in the Millian tradition, Cass

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164. While Wittgenstein is not alone in developing this thought, he is perhaps the most significant twentieth century source. More recent developments of Wittgenstein's thought can be found in Stanley Cavell, The Claim of Reason: Wittgenstein, Skepticism, Morality and Tragedy (1979); Richard Rorty, Consequences of Pragmatism (1982); Richard Rorty, Contingency, Irony, and Solidarity (1989) [hereinafter Rorty, Contingency]; *see also* J.L. Austin, How to Do Things with Words (1962).

165. Lawrence, *supra* note 112; Post, *supra* note 111, at 312-17.

166. ACLU, *supra* note 70, at 13.

167. *Your Right to Say It*, *supra* note 73.

168. ACLU, *supra* note 70, at 11.

169. *Id.* at 7.

170. The right to wear this famous message was upheld in *Cohen v. California*, 403 U.S. 15 (1971).

171. John Stuart Mill, On Liberty (1859), *reprinted in* On Liberty and Other Writings 1, 20 (Stefan Collini ed., 1989).

Sunstein has recently argued that, as a society, we should protect dissent because it has important informational capacity: "[D]issent can be an important corrective"[172] to ensure that the "public is [not] deprived of information it might need."[173] Through analyzing experiments by Solomon Asch, Stanley Milgram, and others on the social phenomena of conformity, cascades, and group polarization, Sunstein argues for the deliberative role of free speech, the need for diversity in the federal judiciary, the need for limited affirmative action, and the general social need for openness.[174] He argues that dissent is "principally valuable as a way of improving decisions."[175] He concludes that "[o]rganizations and nations are far more likely to prosper if they welcome dissent and promote openness."[176]

Dissent, however, is more than avoiding costs and improving informational accuracy.[177] Dissent is about changing the topic, creating a new vocabulary,[178] and providing a new way of seeing.[179] Dissent is also about making visible the existence of minorities who hold different views.[180] When engaged in the process of merely improving the flow of information for purposes of decisional accuracy, one never *has* to question the practices and purposes about which one must make a decision. Dissent—the dissent of Arendt's *Human Condition*—calls for something more: an openness and a seeking after something entirely new.

Hannah Arendt's thought has given us a purchase on both the role of place and the interruptive role of language in making visible both autonomous persons and the political community. Even if language is controlled as dissent or protest, it must nonetheless make an appearance in a public space, not in an isolated zone. If we fashion First Amendment policy and practice to undermine the place of speech, we will have forever lost the opportunity to inhabit collectively a truly shared public sphere. Maybe some would consider that a suitable bargain for obtaining other forms of security. But the values of autonomy and collective self-determination suggest a need for a developed "policy of place" in First Amendment jurisprudence.

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172. Cass R. Sunstein, Why Societies Need Dissent 93 (2003).

173. *Id.* at 110.

174. *See id.* at 14-38.

175. *Id.* at 89.

176. *Id.* at 210-11.

177. Dissent is also about combating injustice when the status quo promotes injustices. *See* Shiffrin, Dissent, *supra* note 1.

178. Richard Rorty argues that we replace outworn vocabularies with new ways of speaking, and that with new ways of speaking we create new ways of inhabiting social space. *See* Rorty, Contingency, *supra* note 164.

179. Irving Howe founded the journal *Dissent* in 1954 out of a similar desire to create a forum to bring new ideas into the public sphere. *See* Irving Howe, *This Age of Conformity*, *in* A World More Attractive: A View of Modern Literature and Politics 251 (Irving Howe ed., 1963).

180. As Heather Gerken observes, "In order for dissent to function in the manner Mill envisioned, it must be visible. If would-be dissenters keep their views to themselves, their ideas will never reach the marketplace of ideas." Gerken, *supra* note 1, at 1760.

## IV. PLACE AND FIRST AMENDMENT DOCTRINE

The previous sections have shown that two alternative "grand theories" of the core First Amendment value—autonomy and deliberation—both fail to accord a proper role for the place of free speech in theory or policy. Place here can be ambiguous, meaning either a place in conceptual understanding or simply a physical place. As Arendt's thought demonstrates, both are implicated. But, how does this understanding of the need for a policy of place affect First Amendment doctrine? How can we put this understanding of place to work in understanding First Amendment jurisprudence—both past and future?

The following sections sketch some applications for a policy that gives due regard to the need for a place in First Amendment practice and jurisprudence. My thesis is not that doctrinal answers to First Amendment issues can simply be "read" off the theoretical framework I have presented here. Rather, since the doctrinal turn asks about the status of place prior to determining whether the speech should be protected, there is some doctrinal truth to the notion of "pride of place."

### A. *Speech in Space*

The Supreme Court's reliance on "content-neutral," "marketplace of ideas" analysis misses the mark when it comes to protecting individual autonomy and fostering deliberative democracy. This reliance would, under the guise of avoiding state censorship of any particular idea or message, permit a world in which there are no alternative messages or ideas to censor.[181] Content-neutrality provides no analytic point of entry into an impoverished "world" that exists quite apart from explicit and directed "state action" in which multiple perspectives cease to exist and the "world" presents itself under only one aspect.[182]

Space provides access to a given forum occupied by others; place provides the location. Even where a place for speech exists, there is no guarantee of broader access for those wishing to speak in that place.[183] Where a place exists, there is a problem of space. Space, no less than place, figures prominently in our philosophical tradition as a necessary condition not only for human experience,[184] but also for human practice—practice

181. *See* Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 296 (1992) ("[C]ourts should attend to the possibility that seemingly neutral restrictions will have content-based effects.").

182. *But see* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) (developing the distinction between content neutral and content based regulation as a valuable analytic distinction).

183. Michel de Certeau comments that "space is a practiced place." Michel de Certeau, The Practice of Everyday Life 117 (1984). For de Certeau, a practiced place is a place defined by the practices that give it shape through their use as place.

184. *See* Immanuel Kant, Critique of Pure Reason (Norman Kemp Smith trans., MacMillan and Co. 1950) (1929) (arguing that space and time are necessary conditions for the possibility of all experience).

that importantly includes discussion and deliberation.[185] As Merleau-Ponty emphasizes, "[S]pace is not the setting (real or logical) in which things are arranged, but the means whereby the positing of things becomes possible."[186]

One problem is that there is no antitrust law for the First Amendment.[187] The Court has recognized the problem of a potential monopoly in its never repeated virtuoso performance in *Red Lion Broadcasting Co. v. FCC*:[188] "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[189] *Red Lion* upheld the "fairness doctrine" promulgated by the Federal Communications Commission requiring broadcasters to provide information on matters of public concern and to give opportunities for each side of an issue to be heard.[190] What is significant about the Court's opinion is that it recognizes (1) that the structure of the "market" for expressing ideas on the airwaves is itself created by law; and (2) that the marketplace, left to its own devices, does not necessarily foster First Amendment values by providing access to "social, political, esthetic, moral, and other ideas and experiences which [are] crucial"[191] to our ability to appear before and create a common political world (to put the point in Arendt's language). The disappearance of plurality and multiple perspectives diminishes the world both politically and ethically.[192] Difference enables a plurality of human identities to appear and provides the tools necessary for individuals to think and act.[193] For this Article's purposes, reliance on content-neutral First Amendment analysis withholds the tools necessary to confront a "world" where politics as the space for the appearance of plurality is denied.

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185. For example, Bruce Ackerman and James S. Fishkin are careful not only to consider what physical spaces public deliberation over electoral candidates might occupy, but also to consider what space on private and public schedules would be necessary. They conclude that space for deliberation can be created by the addition of a national holiday—Deliberation Day. Bruce Ackerman & James S. Fishkin, Deliberation Day (2004).

186. M. Merleau-Ponty, Phenomenology of Perception 243 (Colin Smith trans., 1962).

187. However, the Court did find that antitrust considerations were a sufficient state interest to overcome a First Amendment challenge to the "must carry" provision of the Cable Television Consumer Protection and Competition Act of 1992. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

188. 395 U.S. 367, 90 (1969).

189. *Id.* at 390.

190. *Id.* at 396. *See generally* William W. Van Alstyne, *The Möbius Strip of the First Amendment: Perspectives on* Red Lion, 29 S.C. L. Rev. 539 (1978).

191. *Red Lion* , 395 U.S. at 390.

192. Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 Harv. L. Rev. 1641, 1644-47 (1967) (noting the failure of mass media to present a diversity of ideas).

193. By attempting to destroy all forms of open human interaction, "totalitarian domination tried to establish . . . holes of oblivion into which all deeds, good and evil, would disappear." *See* Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 232 (Penguin Books 2006) (1963).

The Court's opinion in *Red Lion*, it seems, was a single aberration within the free speech tradition. The Court appears to have abandoned the doctrine, as evidenced by its ruling in *Miami Herald Publishing Co. v. Tornillo*.[194] There, the Court struck down a Florida "right of reply" statute that required newspapers to provide rebuttal space for any personally assailed candidate. The Court reasoned that the regulation enacted a penalty on the basis of content by requiring a newspaper to include specific content to the exclusion of alternative content (due to conditions of scarcity).[195] Citing *New York Times Co. v. Sullivan*, the Court further noted that the regulation "dampens the vigor and limits the variety of public debate,"[196] forcing editors to act as self-censors while impermissibly intruding on the "function of editors."[197]

The Court stepped away from its proactive approach to the structure of the marketplace during the five years between *Red Lion* and *Miami Herald*. One stop along the way exemplifies this trend. Writing for a bare majority in *CBS v. Democratic National Committee*, Chief Justice Warren E. Burger refused to uphold requirements that broadcasters allow responsible groups to purchase advertising time to air public issues.[198] Chief Justice Burger used the language of both Meiklejohn and the marketplace to reach a different conclusion than it might seem either would require.[199] He inverted the structural concern and the reasoning used to justify the "fairness doctrine," claiming that it is not important that everyone get to speak. Rather than reading the "fairness doctrine" at issue to provide more egalitarian and open access for groups to air issues, Chief Justice Burger concluded, "The Commission was justified in concluding that the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system so heavily weighted in favor of the financially affluent, or those with access to wealth."[200] Chief Justice Burger reasoned that, if one upholds this use of the "fairness doctrine," the wealthy will be able to determine what issues get heard, thereby undermining the broadcasters' editorial discretion.[201] The "fairness doctrine" itself argues that, absent marketplace intervention on behalf of those who do not own access to mass media, only the "financially affluent" will be heard. Chief Justice Burger implied that, in this regulatory vacuum, monied interests will volunteer to share their space.

Thus, in both *CBS* and *Miami Herald*, the Court refused to engage its own deviation from its more laissez faire, free speech analysis. Indeed, in *CBS*, the Court went so far as to invert the structural analysis to achieve the

194. 418 U.S. 241 (1974) (failing to cite *Red Lion*).
195. *Id.* at 256.
196. *Id.* at 257 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).
197. *Id.* at 258.
198. *See* CBS v. Democratic Nat'l Comm., 412 U.S. 94, 94-95 (1973).
199. *Id.* at 122-23.
200. *Id.* at 123.
201. *Id.*

same result as a content-neutral analysis. From the perspective of an expressive theory, or procedural autonomy, this is acceptable, because we cannot "silence" one speaker to make room for many others. Yet more is required if one is genuinely concerned about the substantive autonomy of speakers and listeners. The Court must protect the possibility of "uninhibited, robust, and wide-open"[202] speech by protecting the structures of collective self-determination that enable the appearance of substantive autonomy (which, in turn, is necessary for robust collective self-determination).

Yet *Red Lion* lives on in dissenting and concurring opinions, much as the call for protecting democratic deliberation and the "free trade in ideas" lived in the dissents of Justices Holmes and Louis Brandeis.[203] In *Turner Broadcasting System, Inc. v. FCC*, the Court upheld a "must-carry" provision that required cable operators to carry local broadcasting stations as part of their "package" of cable programming.[204] The worry was that the cable operators could wield too much market power and refuse to carry local programming in lieu of programming by cable-only companies. Since, at the time of the holding, approximately sixty percent of U.S. households received cable programming (a percentage that has only increased over time), the possibility to undermine the availability of broadcast programming to non-cable households was real. The majority opinion by Justice Kennedy reasoned that the "must carry" provision of the Cable Television Consumer Protection and Competition Act of 1992[205] is content-neutral, and, under the lower scrutiny employed for content-neutral regulation, the Court determined that the regulation did not violate the First Amendment.[206] Here, the analysis proceeded by testing the regulation under intermediate scrutiny to see whether the regulation furthered important governmental interests and whether the regulation burdened more speech than necessary to further those interests.[207] The dissent argued that, because the regulation was based on content, it would have applied strict scrutiny and concluded that the provision was unconstitutional.[208]

In determining that the "must-carry" provision survives intermediate scrutiny, Justice Kennedy did not consider whether and to what degree the provision itself might further important First Amendment values. With these positive values and the precedential authority of *Red Lion*, Justice Stephen Breyer's concurrence added the missing theoretical considerations to the debate. Justice Breyer looked to the purposes of the statute to preserve the benefits of free broadcasting and promote widespread

202. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
203. *See supra* note 42 and accompanying text.
204. Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).
205. Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified in scattered sections of 47 U.S.C.).
206. *Turner*, 520 U.S. at 180.
207. *Id.* at 185, 213-14.
208. *Id.* at 234-35 (O'Connor, J., dissenting).

dissemination of information as providing the basis for analysis.[209] Recognizing the important First Amendment values on both sides of the issue, Justice Breyer reasoned that the policy of wide dissemination of ideas "seeks to facilitate the public discussion and informed deliberation, which, as Justice Brandeis pointed out many years ago, democratic government presupposes and the First Amendment seeks to achieve."[210] Not only did Justice Breyer recognize the positive value and role of state intervention to promote widespread conveyance of ideas; he also cited *Red Lion* as authority for that proposition.[211] Justice Breyer's argument was significant because it protected the space of appearances amidst the rather lifeless and mechanical jurisprudence of both the majority and dissent in *Turner*. The key operative question here was not which level of judicial scrutiny to exercise, but rather what value is being promoted. Recall that the debate over the level of judicial scrutiny is tethered to "content-neutral" analysis. If the regulation is content-neutral, then courts employ "intermediate scrutiny." If the regulation is content-based, the courts employ "strict scrutiny." One can engage in "content-neutral" analysis with little or no reference to the underlying First Amendment and democratic values that ostensibly animate the judicial tests.[212] In asking what democratic values are at stake, Justice Breyer reasoned within a broadly Arendtian vision of the political world, which requires space for appearances and encounters in the public sphere.

In its first foray into cyberspace, the Court in *Reno v. ACLU*[213] recognized the valid justifications for intervention into broadcast media in cases like *Red Lion*.[214] The Court distinguished, however, the provisions of the Communications Decency Act of 1996 (CDA)[215] from other regulations, because there was no history of regulation, scarcity of resources, or a particular form of invasive communication.[216] Because the space was wide-open without the problems of access encountered in other broadcast media, the Court was properly sensitive to preserving that openness as essential to free speech.[217] Justice John Paul Stevens's opinion is bereft of any high-minded theories of autonomy or democracy, but recognition of both is implicit in the opinion's concern that communication

209. *Id.* at 226 (Breyer, J., concurring).

210. *Id.* at 227.

211. *Id.* at 227 (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)); *see also* Owen M. Fiss, *The Censorship of Television*, 93 Nw. U. L. Rev. 1215 (1999).

212. This approach is consistent with Justice Stephen Breyer's overall approach to constitutional interpretation. Justice Breyer argues "that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution 5 (2005).

213. 521 U.S. 844 (1997).

214. *Id.* at 849.

215. 47 U.S.C. § 223 (2000).

216. *See Reno*, 521 U.S. at 868-70 (distinguishing, for example, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989), where government regulation of indecent as well as obscene commercial telephone messages was "invasive").

217. *See id.* at 874.

is kept wide-open. Further, what is perhaps most important in the context of broadcasting cases is the recognition that the First Amendment can protect speakers from being drowned out by other non-state speakers. Stevens observed that the CDA, through its "knowledge" requirement which silences speech at the moment the speaker becomes aware that a minor is listening, invites listeners to silence speakers by posing as minors on the Internet. He noted, "It would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers" that a minor is present.[218] Thus, other speakers can restrict the space for speech, and the Court has an affirmative duty to protect a speaker from being forced out of the space of communication. Such a role is consistent with the broadcast cases' concern for providing space for speakers. They are an attempt to avoid not so much a specific "heckler's veto," but the functional equivalent—crowding out from the relevant space to speak.[219]

The fundamental problem is this: As long as the Court focuses on protecting procedural autonomy through "content neutral" analysis, there is no guarantee that the content necessary for human freedom will appear. Cultivating this content is not just a matter of slight adjustments to enable more passive reception of a wider array of information. This content requires the active participation in speaking and listening, of appearing and being appeared to, as each individual creates an identity in public space. Fostering this substantive account of autonomy requires more than a negative injunction against content discrimination. It requires the active, but careful, participation of Congress and courts in crafting social structures that allow for and promote the plurality of human appearances. For there to be substantive exchange through speech of ideas between autonomous agents—the appearance of new ideas that Arendt advocates—there must be space. However, judicial and legislative bodies have always circumscribed that space. Hence, ducking the question of providing space for the appearance of the new fails to acknowledge both the importance of substantive autonomy and the responsibility to protect it.

The Court should start by listening carefully to Justice Breyer's concurrence in *Turner*—much as the Court eventually listened to Brandeis's concurrence in *Whitney v. California*.[220] In order to ensure public debate that is "uninhibited, robust, and wide-open,"[221] it is important that the Court's First Amendment jurisprudence be guided by the principle that a plurality of human political appearances be made visible, including

218. *Id.* at 880.

219. Censorship justified by audience reaction has been upheld in cases such as *Feiner v. New York*, 340 U.S. 315 (1951). An alternative approach to protecting speech is found in the sporadic doctrinal history of the "heckler's veto"—which puts the State in the role of insuring the openness of public space for speakers against private attempts to silence. *See* Brown v. Louisiana, 383 U.S. 131, 133 (1966); Harry Kalven, Jr., The Negro and the First Amendment (1966).

220. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

221. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

both dissent and agreement. To this end, the Court must think beyond content-neutrality and mere freedom of choice when the choices have been socially (and judicially) structured. Since the "marketplace" in which ideas occur is always already structured by the law,[222] the Court's analysis can never achieve the "neutrality" it purports to attain in evaluating state regulations.[223] The Court must look at the substantive effects of the "marketplace of ideas," for, left to its own devices, the space within that marketplace may contain very little diversity of thought.

### B. *The Marketplace and "Public Forum" Analyses*

So far the question of whether speakers have sufficient space on existing venues has presupposed that a place for public discourse exists, whether it is a traditional public forum, a special government-protected forum, or some other private place. What happens, however, when there are too few venues for speech in the first place? If the first rule of real estate is "location, location, location," then something similar must be the case with regard to free speech. That is, for public speech to occur, there must first be a location for free speech. For dissent to be visible, there must first be a place that can become a venue for expressing dissent and then space within that venue. Locating free speech is a problem encompassed by the Supreme Court's "public forum" doctrine, and one that is implied by the Court's reliance on the "marketplace of ideas" metaphor.

One way in which the individual, liberated from exclusive concern with the bare necessities of life, meets his or her needs is through exchanging goods in a marketplace. To evoke the image of the "marketplace" is to evoke the Greek tradition of the *agora* where men met as equals in the marketplace, and where more than mere physical goods were exchanged. Exchange of ideas and a meeting of equals was a vital aspect of the *agora* where Socrates spent his time questioning the artisans, poets, and politicians.[224]

The image of the marketplace has captivated the Supreme Court since its introduction by Justice Holmes in his dissent in *Abrams v. United States*.[225] There, Holmes wrote,

> [T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in

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222. *See, e.g.*, Post, *supra* note 137, at 1255 (arguing that speech occurs in "the social contexts that envelop and give constitutional significance to acts of communication").

223. *See* Fiss, *supra* note 28; Sunstein, *supra* note 172.

224. Plato, Apology of Socrates, *reprinted in* Four Texts on Socrates 63 (Thomas G. West & Grace Starry West trans., Cornell Univ. Press rev. ed. 1998).

225. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). David Cole provides an excellent discussion of the role of creative misreading in the development of dissenting opinions into majority doctrine, one example of which is the evolution of the "marketplace." *See* David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 Yale L.J. 857 (1986).

> the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[226]

The idea that truth will prevail over falsehood in a free exchange of ideas has a rich tradition from Milton's *Areopagitica*[227] to Mill's *On Liberty*.[228] The value of free speech in the Miltonian tradition is found only in its connection to revealing the truth. Under this view, competition is in service of truth, as Justice Lewis Powell in *Gertz v. Robert Welch, Inc.*,[229] expressed the point: "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[230] Central to Holmes's dissent in *Abrams* is also the idea that we have imperfect knowledge and that "all life is an experiment," providing the seeds for the value of exchange itself.[231]

The specific conversion of Holmes's "free trade in ideas" into the phrase "marketplace of ideas" occurs in Justice Brennan's concurrence in *Lamont v. Postmaster General*.[232] That decision invalidated a federal statute allowing delivery of "communist political propaganda" only if the addressee requested receipt in writing.[233] Justice Brennan wrote, "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[234] In Brennan's voice, Holmes's interruption of the then-dominant free speech tradition is focused not on the battle between truth and falsehood, but on the value of exchange itself. Holmes's dissent became the foundation for a new tradition in the Court's repeated use of the metaphor of "marketplace of ideas," in which the values of truth and exchange are alternately emphasized.[235]

But what does a "marketplace of ideas" mean? It would seem, by simply parsing the words, that there must be a market (understood as a forum or channel of exchange), a place (understood as a location for that exchange), and the presence of ideas (understood as the currency of exchange). The ambiguity between a place, as in the *agora*, and a market process, as in

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226. *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting).

227. John Milton, *Areopagitica*, *reprinted in* The Prose of John Milton 265 (J. Max Patrick et al. eds., 1968).

228. Mill, *supra* note 171.

229. 418 U.S. 323 (1974).

230. *Id.* at 339-40.

231. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). This echoes the pragmatic sentiments of John Dewey in lectures given in 1918, one year before the *Abrams* decision: "Deliberation is an experiment in finding out what the various lines of possible action are really like." John Dewey, Human Nature and Conduct: An Introduction to Social Psychology 190 (1930).

232. 381 U.S. 301 (1965).

233. *Id.* at 305.

234. *Id.* at 308 (Brennan, J., concurring).

235. The "marketplace" metaphor has appeared in sixty-one Supreme Court cases since Justice William Brennan's crafting of Holmes's idea.

operation of Adam Smith's "invisible hand," has persisted in the Court's use of the metaphor.[236] Use of the "marketplace of ideas" seems to mean simultaneously a place and a process of exchange. One might conclude that the repetition of the metaphor has tended to empty it of any precise meaning. One can thoughtlessly employ the phrase "marketplace of ideas" in advocating any kind of inaction on the part of the Court or Congress to sustain a feeling that in fact there is a place in which ideas are openly and robustly exchanged. It is "thoughtless" because, like Smith's "invisible hand," it is an abstraction.

By contrast to the invisibility of the "hand" of market exchange, the *agora* was a physical place, protected and fostered, where citizens would meet as autonomous agents engaging in a version of collective self-determination. If we want to foster the appearance of ideas that can be openly exchanged, then we must move beyond repetition of metaphors to foster actual places of autonomous exchange. Nevertheless, in focusing on the need to create and sustain actual places where persons become visible to each other as autonomous agents, courts will do well to heed Judge Cardozo's advice: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[237]

The Court has used the metaphor of the marketplace to suggest an open forum for the appearance of truth. Witness the unanimous opinion in *Red Lion*: "[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."[238] The Court also employs the marketplace metaphor to support the Court's "content-neutral" analysis and its laissez faire orientation to evoke a place where government intrusion is most unwelcome. For example, Justice Stevens, in *FCC v. Pacifica Foundation*,[239] upheld the FCC's ability to censor "obscene language" from the airwaves during times when children are likely to be listening.[240] Justice Stevens, joined by two Justices, wrote "For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."[241] Although the FCC's Declaratory Order that the

236. Critics too tend to focus on the importance of the market to the exclusion of considering the importance of place. For example, Professor Vincent Blasi focuses on a neoclassical view of commercial markets to argue that the market role—and not the truth-seeking role—of speech "does not offer the prospect of wisdom through mass deliberation, nor that of meaningful political participation for all interested citizens." Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 Sup. Ct. Rev. 1, 46. This reading is perhaps closer to what Holmes wrote in *Abrams*, where he did not use the concept of "marketplace" now attributed to him. He employed the phrases "free trade in ideas" and "competition in the market." *Abrams*, 250 U.S. at 630. However, the Court has taken on the "marketplace" concept, which unavoidably calls attention to the need for a place where "free trade in ideas" might occur.

237. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

238. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

239. 438 U.S. 726 (1978).

240. *Id.* at 750.

241. *Id.* at 745-46.

radio station was subject to administrative sanctions was undoubtedly content-based, the Court reasoned that the interest in protecting children from obscenity and the privacy interests of adults in their homes was sufficient to grant power to the censor in the marketplace.[242] Note, however, that this intrusion in the marketplace, where the government must remain neutral, was made on the basis of speech that the Court has characterized as "low value" obscenity, which does not deserve full First Amendment protection. The Court has carved out small exceptions to neutrality in the marketplace—obscenity,[243] fighting words,[244] libel,[245] and incitement to imminent harm.[246] But, the exceptions to neutrality also serve to prove the rule. In *Pacifica*, the rule of content-neutrality was specifically tied to the "marketplace" metaphor.[247] The doctrinal neutrality indicated that the structural features of the market itself were not at issue for the court.

Even Justice Brennan's dissent in *Pacifica* contained the "marketplace" metaphor in service of neutrality. Justice Brennan would place the responsibility for weeding out undesirable communication "in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand."[248]

Justice Brennan's dissent in *CBS*, however, broke with the tradition of speaking of the marketplace in purely economic, neutral terms by making clear the role of place in the "marketplace."[249] Brennan shifted the focus on the "marketplace" from an occasion for exchanging ideas in pursuit of truth to a meeting of individuals on political space requiring a real place: "[F]reedom of speech does not exist in the abstract. On the contrary, the right to speak can flourish only if it is allowed to operate in an effective forum—whether it be a public park, a schoolroom, a town meeting hall, a soapbox, or a radio and television frequency."[250] Without a public place where individuals can gather, there is no place where the appearance of the political can occur. Without a place of appearances, there can be no political life.[251] Thus, Justice Brennan importantly shifts the focus of the "marketplace" metaphor to the need for place. This departs in important ways from the Court's repeated treatment of the marketplace as a site of neutrality in advocacy for truth.[252] Yet, Brennan's dissent in *CBS*, while a

242. *Id.* at 749.
243. Miller v. California, 413 U.S. 15 (1973).
244. Feiner v. New York, 340 U.S. 315 (1951).
245. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
246. Brandenburg v. Ohio, 395 U.S. 444 (1969).
247. *Pacifica*, 438 U.S. at 745-46.
248. *Id.* at 772 (Brennan, J., dissenting).
249. CBS v. Democratic Nat'l Comm., 412 U.S. 94, 175 (1973) (Brennan, J., dissenting).
250. *Id.* at 193.
251. Brennan advocated the Meiklejohn theory of the democratic purposes of the First Amendment. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 Harv. L. Rev. 1 (1965).
252. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless; they interfere with the truth-seeking function of the

notable recognition of the importance of place to free speech values, remains deeply embedded in the First Amendment tradition: "[I]t has traditionally been thought that the most effective way to insure this 'uninhibited, robust, and wide-open' debate is by fostering a 'free trade in ideas' by making our forums of communication readily available to all persons wishing to express their views."[253] Here, Brennan utilized the Holmesian tradition of the economic reading of "free trade in ideas" while specifically grounding it in a place—a forum where individuals can appear as citizens.

Brennan's dissent also highlights a concurrent strain in the First Amendment tradition. The Court has employed what it calls a "public forum" doctrine to cases where the issue is not simply about the fact *that* something is being said, but the issue is about the fact of *where* it is being said. From the Arendtian perspective, the fact that someone is able to speak is inseparable from the need for that speech to have a place of political appearance. The Court has long recognized that there can be exceptions to its content-neutral analysis for restrictions on the time, place, or manner of the speech.[254] The public forum analysis is a way to analyze when restrictions based on the place of the speech are permissible.

In addressing regulation of the place of speech, the Court has carved out distinctions within the category "public forum." In *International Society for Krishna Consciousness, Inc. v. Lee*,[255] the Court distinguished (1) traditional public fora, such as parks and streets, described by Justice Owen J. Roberts in *Hague v. Committee for Industrial Organization* as places that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly;"[256] (2) designated public fora the state has opened for expressive activity; and (3) other public property.[257] If the forum falls into either category (1) or (2) and the

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marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech . . . .").

253. *CBS*, 412 U.S. at 184 (Brennan, J., dissenting).

254. *See* United States v. O'Brien, 391 U.S. 367 (1968) (establishing the test for regulation of nonspeech elements of speech). Time, place, and manner restrictions are permissible, among other occasions, when they limit the locations of adult theatres, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 51 (1976) (concluding that the city's interest supports the different treatment of adult theatres limiting "the place where adult films may be exhibited," even though based on distinguishing content), restrict amplified music, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasizing that the time, place, and manner regulation must be narrowly tailored to serve a legitimate government interest), and restrict placement of tobacco products advertisements, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) (holding that Massachusetts had demonstrated a substantial interest in preventing access to tobacco products by minors and certain provisions had employed appropriately narrow means to advance that interest).

255. 505 U.S. 672 (1992).

256. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

257. *See also* Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983) (employing a tripartite framework to differentiate government property that is a traditional public forum, government property that is an expressly dedicated forum, and non-dedicated government property).

restriction is related to content, then the Court applies strict scrutiny, examining regulations to determine whether they have been narrowly drawn to achieve a compelling state interest. If it is considering a category (1) or (2) forum with a content-neutral restriction, then the Court applies intermediate scrutiny. But if the forum belongs to category (3), then the Court looks only to the reasonableness of the regulation, so long as the regulation is not motivated by disagreement with the speaker's viewpoint.[258]

In *Krishna*, the Court held that LaGuardia Airport is neither a traditional nor a designated public forum and, therefore, restrictions on leafleting could be deemed reasonable.[259] Although the airport is publicly owned and open to the public, the Court upheld a complete ban on leafleting on public issues, a core feature of First Amendment political speech.

Justice Kennedy's concurrence in *Krishna* neatly summarizes what makes this decision so analytically troubling: "Public places are of necessity the locus for discussion of public issues . . . . At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places."[260] The Court created a new set of distinctions among kinds of public fora and then applied intermediate scrutiny to any regulation that could be reasonably construed as content-neutral. This extends the general "content-neutral" approach beyond the "marketplace" metaphor not only by supposing that the competition for places to speak occurs within a neutral structure, but also by using that neutrality to lower the level of scrutiny. Presently, the mask of neutrality is used in conjunction with designating types of public fora to diminish rather than enhance speech opportunities and locations.

Failing again to protect public access to fora where language and ideas can flourish in public practice, the Court in *United States v. Kokinda* found that the government may restrict speech on a public sidewalk leading to a post office.[261] Because the Court claimed the sidewalk was not a traditional or designated forum, it examined the prohibition only for reasonableness, a standard easily met.[262] Intuitively, one might consider post office grounds a classic example of a forum in which persons congregate in public, if only for brief periods of time. It is of little consolation to those seeking a forum in which to exchange ideas that "the regulation does not discriminate on the basis of content or viewpoint."[263]

Because the value of public speech, particularly about public issues, is central to the First Amendment, it follows that the Court has inverted the jurisprudential goal. Rather than protect and foster places for individuals to create their political identities, the Court purports to limit only the most

258. *Krishna*, 505 U.S. at 678-79.
259. *Id.* at 680.
260. *Id.* at 696.
261. United States v. Kokinda, 497 U.S. 720 (1990).
262. *Id.* at 727.
263. *Id.* at 736.

egregious forms of regulation. However, because airports and post office sidewalks play an important role in public life, this limitation is vacuous. Many "traditional" public fora no longer exist in any functional sense.[264] In most communities, one encounters few fellow citizens on the sidewalk other than those passing by in cars. Parks and town squares are no longer the central places for encountering fellow citizens that they once may have been.[265]

Because the occasions for face-to-face encounters and discussions between humans qua humans have become so few and so limited in scope, the Court must begin to look at the role a specific location plays in fostering occasions for political appearances.[266] If the place can be a place of political appearance, then the Court must encourage its use and abandon crabbed distinctions among kinds of public fora. At a minimum, this entails extending heightened scrutiny to all regulations of place that have a significant impact on speech. The Court's current categorization of place as property takes priority over consequences to public speech and discourse.[267] This inverts the analytic priority of free speech. First, the overlay of public fora categories to preserve property interests simply does not protect or foster speech and should be abandoned. Second, to the extent that categorizing public places according to their historical use is deeply entrenched in judicial doctrine, heightened scrutiny should be adopted for all regulations of place that have substantial effects on speech and public discourse. The costs of failing to do otherwise are high.

Many famous public protests occurred fully within a public forum—for instance the march from Selma to Montgomery, Alabama along a public highway in March, 1965. The district court in Alabama enabled this protest by employing a very different test designed to foster, rather than suppress, significant public protest.[268] Judge Frank M. Johnson, Jr., boldly weighed

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264. The existence of traditional practices is the cornerstone of Justice Antonin Scalia's theory of constitutional interpretation. If he persuades the Court to adopt this theory, we could have a right to free speech but have no place to exercise it because "traditional" sites and "traditional" practices cease to exist. An overemphasis on tradition necessitates the disappearance of free speech, when tradition disappears. *See* Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 688 (1996) (Scalia, J., dissenting) ("If that long and unbroken tradition of our people does not decide these cases, then what does?"); Rutan v. Republican Party of Ill., 497 U.S. 62, 95 (1990) (Scalia, J., dissenting) ("[W]hen a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use . . . we have no proper basis for striking it down."). It is precisely free speech in the form of expressing political viewpoints that is endangered by the construction of "protest zones."

265. For policy recommendations regarding the importance of encountering fellow citizens in public places, see Mickey Kaus, The End of Equality 78-102 (1992).

266. Concern over the loss of the public sphere as a loss of occasions for persons, as citizens, to encounter each other is central to Bruce Ackerman and James Fishkin's recent call for a new national holiday. *See generally* Ackerman & Fishkin, *supra* note 185.

267. *See* Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 Hastings L.J. 309 (1999).

268. Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965). For an argument defending the "principle of proportionality" of Judge Frank M. Johnson, Jr., against current

the effects on public discourse with the asserted interests in maintaining order in a way that gave effect to the importance of speech over regulation of place. He wrote, "[I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."[269]

But the current, content-neutral, public forum analysis may not permit such protest. The real concern is that our current First Amendment analysis has legitimized the regulation of place such that future Selmas may never come to pass. Less tolerance exists for mass protest movements, and even for the random and isolated individuals carrying signs with statements like "The Bushes must love the poor—they've made so many of us."[270] These policies that chill speech and dissent diminish the public sphere, and eliminate content we may never know. Although press reports about protests against the WTO in places like Seattle, Quebec City, and Miami focus mostly on the supposed violence of the protesters, in all of these cases, officials created speech zones to prevent or limit the place of free speech.[271] Similarly, the 2000 GOP convention in Philadelphia essentially "privatized" the whole downtown area so that there could be no visible dissent. Such a policy foreclosed the issue of free speech by focusing attention on the less controversial issue of protecting rights to property and place.

These distinctions among public and nonpublic fora, however, apply only to publicly owned property. The matter is altogether different if the place is privately owned, but the problem is much the same. The modern *agora*, one might argue, is the shopping mall. Like the Greek *agora*, the mall is a site where citizens gather to exchange goods. However, unlike the Greek *agora*, the shopping mall is not a "public forum" within the meaning of the Court's criteria because the shopping mall is privately owned.

After a brief interlude in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,[272] the Court has curtailed the right to speak out in privately owned places. By employing precedent that allowed canvassing of neighborhoods, Justice Thurgood Marshall sought to preserve the right to picket at a supermarket, holding that "[t]he shopping center premises are open to the public to the same extent as the commercial center

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"forum analysis," see Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 Yale L.J. 1411 (1995).

269. *Wallace*, 240 F. Supp. at 106.

270. This was a sign that retired steelworker Bill Neel was attempting to hold when he was arrested in Pittsburgh, Pennsylvania, after he refused to go to the designated "protest zone" out of sight of the press and President. *See* Lindorff, *supra* note 78.

271. *See generally* Aaron Perrine, Note, *The First Amendment Versus the World Trade Organization: Emergency Powers and the Battle in Seattle*, 76 Wash. L. Rev. 635 (2001) (arguing that even under current "time, place, manner" restrictions, Seattle's "no-protest zone" violated the First Amendment).

272. 391 U.S. 308 (1968).

of a normal town."[273] It was, however, a short-lived intervention in a long tradition that has refused to extend First Amendment protection to private places. In *Lloyd Corp. v. Tanner*, Justice Powell permitted the exclusion of anti-Vietnam war protesters from passing out leaflets in a Portland shopping mall, reasoning that the First Amendment does not protect the right of a trespasser or uninvited guest to speak on private property.[274] Explicitly overruling *Logan Valley*, Justice Potter Stewart, in *Hudgens v. NLRB*, concluded that "the constitutional guarantee of free expression has no part to play" in a case where individuals sought to convey their views on private property.[275] The individual autonomy of the property owners provides the fundamental justification for excluding the "self-expression" of others. Here, property trumps speech, pointing to the background conceptions of place that may motivate the exclusion. The problem is that the preservation of place in the First Amendment context is parasitic to actual property—and property is "owned." There are no places for speech to occur that are not already implicated in a property regime.[276]

Justice Marshall's dissent from *Tanner* notes that increasingly private places replace former public sites for gathering. Thus, "[i]t becomes harder and harder for citizens to find means to communicate with other citizens."[277] The freedom to speak is meaningless unless one has a place to address one's fellow citizens. If there are no places for actual interaction, then, as Arendt notes, the "real" world of political appearances cannot exist, and our lives are directly impoverished no less than if we were to live under tyranny.[278] If there is no publicly owned *agora*, it does not follow that the *agora* is not necessary for political life. Indeed, the need for the Court to identify the modern age's functional equivalent to the agora is all the more critical absent a publicly owned, traditionally used *agora*.[279] For, without the *agora*, individuals cannot publicly appear. Without political appearance, individuals cannot exchange the speech and action necessary for political life. Without the meeting of citizens for speech and action,

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273. *Id.* at 319.

274. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

275. Hudgens v. NLRB, 424 U.S. 507, 521 (1976). *But see* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (upholding a California Supreme Court ruling that the California Constitution protected the rights of appellees to solicit signatures for a petition in a central courtyard of a shopping center).

276. However, as Carol M. Rose argues, property itself has a communicative quality. "[P]roperty looks like a kind of speech, with the audience composed of all others who might be interested in claiming the object in question." Carol M. Rose, *Possession as the Origin of Property*, 52 U. Chi. L. Rev. 73, 79 (1985). If one takes this view of property, then Justice Potter Stewart may not be so far off base to oppose one form of speech—the communicative function of property rights—with another form of speech—the political and deliberative. On the importance of the public forum as "property," see Massey, *supra* note 267.

277. *Tanner*, 407 U.S. at 586 (Marshall, J., dissenting).

278. *See supra* notes 156-58158 and accompanying text.

279. Cyberspace is one place in which greater public interaction has most definitely occurred. *See, e.g.*, Eugene Volokh, *Cheap Speech and What It Will Do*, 104 Yale L.J. 1805 (1995). For concerns about cyberspace and democracy, see Sunstein, *supra* note 22.

there cannot be human freedom, and without freedom, there is no autonomy left for the First Amendment to protect.

Human autonomy and democratic deliberation both require a space and a place for appearances. Space requires a field or forum constituting a defined place and room in relation to others in that place. Place provides a location for free speech. These two concepts have analytically interacted under current doctrine in ways unsatisfactory for either. For example, in *Arkansas Educational Television Commission v. Forbes*, Justice Kennedy was concerned that, if programmers were not free to exclude some candidates for a political office from a televised debate, no debate would be had at all.[280] Thus, he refused to recognize that space on a debate forum implicates core constitutional values going to the "essence of self-government."[281] Instead, the Court feared that "[w]ere it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all."[282] Where access to a nonpublic forum is at stake, as opposed to a traditional or nontraditional public forum, the Court uses an analysis of place to deny a right to space on the forum by a speaker engaged in core political speech.

We can only hope that Justice Marshall's analysis will yet bear fruit and counter the univocality of the Court's use of the "content-neutrality," "marketplace," and "public forum" concepts. The use of these concepts requires the Court merely to avoid procedurally suppressing autonomy and speech; but mere reliance on procedural justice to protect and foster autonomy is much too thin to ensure the actual existence of robust, uninhibited speech. Captivated by its own picture of "content-neutrality," the Court does not attend adequately to the structural effects on substantive human autonomy, deliberative democracy, and the public sphere, all of which are necessary for the kind of public speech that the Constitution aspires to protect.

### C. *Captive Audiences*

One thesis of the previous two sections is that the Court has been held captive by its own use of the "marketplace of ideas" metaphor and its procedural rule favoring "content neutrality." The problem is that remaining neutral is consistent with policies that would dislocate the very place for the "marketplace of ideas." In order to produce a "marketplace" lacking a wide assortment of voices from which to choose, the state need not regulate content directly for that content to lack a plurality of views. Indeed, one of the key problems with the "marketplace" metaphor is its implicit assumption that the listener is a passive consumer of goods. The listener is very much like the passive consumer in a supermarket.

280. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998).
281. Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
282. *Forbes*, 523 U.S. at 681.

Consumers walk down the aisle and choose a brand of cereal, already packaged in the appropriate forum with a designated space. Such imagery is problematic because autonomous agents are not passive choosers, and robust democratic collective self-determination does not exist in passive form.[283] Ideas are not packaged by a parliamentarian from above like the grocer who chooses, arranges, and presents a range of goods on a supermarket shelf. Ideas need to be presented to and acknowledged by persons engaged in dialogic exchange in the manner envisioned by Arendt.

This Article argues that a particular picture of autonomy has dominated the Court's jurisprudence. The Court has focused on the passive virtues of procedural autonomy rather than the active participation of individuals in the public sphere. This notion of passivity is central to the Court's "captive audience" doctrine. In upholding a city ordinance prohibiting picketing in a residential neighborhood, the Court provided the following: "The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech."[284] The idea is that people are coerced into being listeners, and the paradigmatic instance seems to be unwanted speech directed at the home.[285] Under this reasoning, the First Amendment protects the passive individual who should not be "coerced" into listening or speaking. The Court does not look at the content of a possible exchange, or the degree to which the captive audience is treated as a potential interlocutor in a debate occurring in a public place. Rather, since the situation is one in which the listener had no "choice" but to listen, the Court decided that such picketing violates the First Amendment.

The Court has also employed this doctrine in the context of political speech in a state owned bus. In *Lehman v. City of Shaker Heights*, the Court upheld the city's policy of refusing to sell to candidates for political office advertising space on advertising placards placed inside and outside the bus.[286] The city was free, however, to sell advertising space to purely commercial interests. In a mix of public forum and captive audience analysis, the Court held that the passengers on the bus are a captive audience and "reasoned that viewers of billboards and streetcar signs had no 'choice or volition' to observe such advertising."[287] Further emphasizing the point, Justice Harry Blackmun wrote for the majority that the transit system "[u]sers would be subjected to the blare of political propaganda."[288] The Court's reasoning suggests that if the speech is political *propaganda* then one should not be forced to listen. But, as Justice Brennan noted in

283. The problem of passivity is closely connected to the loss of the public sphere. *See* Bruce Ackerman & Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (2002); Kaus, *supra* note 265.

284. Frisby v. Schultz, 487 U.S. 474, 487 (1988).

285. *Id.*; *see also* FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

286. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974).

287. *Id.* at 302.

288. *Id.* at 304.

dissent, there is no small irony in the Court's "sanction[ing] the city's preference for bland commercialism and noncontroversial public service messages over 'uninhibited, robust, and wide-open' debate on public issues [that] would reverse the traditional priorities of the First Amendment."[289]

The majority was concerned about "lurking doubts about favoritism, and sticky administrative problems [that] might arise in parceling out limited space to eager politicians."[290] There was no worry that, by placing advertising in the same space, the state might appear to endorse particular commercial products, though the reasoning would be equally valid. By first deciding the prior question about the role of the place—whether a public or nonpublic forum by tradition or government designation—the Court prefigured how the issue of speech was to be treated. If the place is a nonpublic forum, then control "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[291]

What is troubling about *Lehman* is that the Court does not protect the existence of a forum, even for core political speech. Though the "marketplace of ideas" is meant to provide all the exchange necessary for autonomous agents to participate in collective self-determination, the Court paid insufficient attention to the very existence of places that can become markets. Furthermore, the very idea of protecting a "captive audience" presumes that an audience is not actively engaged in the exchange of ideas, but is passively receptive to whatever the given social structure presents to it—in this case, commercial, but not political, ideas. *Lehman* is also dangerous because it lives on through public forum cases like *Kokinda*,[292] as we have seen, which fail to recognize the importance of protecting public places of appearance.[293]

*Lehman* inverted the order of priority between political and commercial speech. The normal doctrinal hierarchy typically provides political speech more protection than commercial speech. This repeated the Court's reasoning a year earlier in *CBS v. Democratic National Committee* in which the Court held that the First Amendment does not require commercial broadcasters to accept paid editorial advertising concerning issues of public concern.[294] There, Chief Justice Burger explicitly admitted the strange irony of protecting commercial speech but not political: "The Commission is also entitled to take into account the reality that in a very real sense listeners and viewers constitute a 'captive audience.' . . . It is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts."[295]

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289. *Id.* at 315 (Brennan, J., dissenting).
290. *Id.* at 304 (majority opinion).
291. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).
292. United States v. Kokinda, 497 U.S. 720 (1990).
293. *See supra* notes 261-63 and accompanying text.
294. CBS v. Democratic Nat'l Comm., 412 U.S. 94 (1973).
295. *Id.* at 127-28.

These two cases represent an extraordinary judicial disdain for the political and a trenchant captivation by a particular image of autonomy. The captive audience doctrine tethers the Court to a mistaken picture of social reality (the pervasiveness of commercial speech which we cannot choose to avert), and of the nature and role of autonomy (the passive chooser), and of place. The mistaken image of social reality stems from a belief that the Court can meaningfully distinguish cases in which one has choice or volition in what one hears, and cases in which one does not. First, all acts of listening involve a certain component of "captivity." We are constantly inundated with messages. Simply from commercial speech we constantly receive messages from billboards, radio ads, newspaper ads, and television ads. It would be impossible to walk or drive through any populated area without being compelled to receive commercial messages.

Second, there is the social reality of interacting with others. One is captive to the speech of others simply by being in their presence. The presence of other human beings pervades our lives; and perhaps our "captivity" to the presence of others nowhere manifests itself more clearly than in the workplace. Only by becoming a hermit can one exercise "choice and volition" over whether or not to hear the speech of others. Most of us must work, and hence cannot exercise "volition" not to hear the messages of workplace colleagues.[296] No social distance from others exists to give us such a choice. Action in the presence of others requires a constant openness to the appearance of reciprocal, and sometimes uninvited, acts of communication.

The Court's image of the passive chooser is thus inadequate and misleading. We do not passively consider the reasons for interacting with others in a whole host of social situations. The Court's reasoning is thus mistaken about both the nature of social reality and autonomous choice. We are all captives to others' speech—and it is a good thing too.[297] Or, to put the point in Justice John M. Harlan II's words, "That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength."[298]

Arendt urges the abandonment of this captivating picture of people as passive receivers of language rather than active engagers in speech. But the Court persists in sustaining its own picture of the passive individual before whom the world is but a play of ideas, some of which the individual might

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296. Professor Balkin also rejects the coherence of captive audience doctrine. Resonating with my approach here, he suggests that captive audience doctrine "should regulate particular situations where people are particularly subject to unjust and intolerable harassment and coercion. . . . [The doctrine] should protect people in coercive situations, not places." J. M. Balkin, *Free Speech and Hostile Environments*, 99 Colum. L. Rev. 2295, 2312-13 (1999) (emphasis omitted).

297. Stanley Fish goes further by arguing that all speech acts are constrained, not free. They are constrained by (1) one's purposes and interests; (2) selection which always leaves aside something else one might have said; and (3) consequences. *See* Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too*, Boston Rev., Feb. 1992, at 3.

298. Cohen v. California, 403 U.S. 15, 25 (1971).

"choose" to purchase in the "marketplace." The Court would do well to abandon its doctrine of captive audiences and focus instead on fostering social situations and structures that insure the existence of the kinds of places where we can all be captive to the flow of ideas in the Court's much vaunted "marketplace of ideas."

### D. *Doctrinal Consequences and Solutions*

The problem with "protest zones" may be obvious to most observers from the very beginning. It seems patently antithetical to core First Amendment values to make dissent disappear "over there" in a protest zone, or under the train tracks, or in a metal cage. The problem in First Amendment policy and doctrine, however, is that too little attention has been paid to the role of place. Thus, since, in principle, such dissent is proscribable by virtue of where it occurs—in a "public" place—the Court must rethink its policies regarding place. As a simple recommendation, it might be fair to say that where some may not gather, none should. That is, if there can be no putative "protestors" then there should be no viewers of presidential events at all. But that would fully undermine our democratic system, and, by implication, so too does shunting "protestors" out of sight. For the autonomy and deliberation of all, all must be visible and all must share public space and place. To the extent that public officials are concerned about maintaining order in the public sphere to avoid a cacophony of speakers, something like Meiklejohn's or Fiss's "fair minded parliamentarian" may be appropriate.[299] Silencing everyone is not.

One implication of the argument put forth in this Article—that we can only promote our other values of autonomy and deliberation if we attend to the policy implications of place—is that the Court should abandon rules that allow the foreclosure of speech by prior determination of the status of the forum in which the speech occurs. Speech should take analytic priority over place. Public forum analysis begins with a categorization of place and ends with a conclusion about the regulation of speech. Instead, analysis should begin with the regulation of speech and end with a conclusion about speech. This claim does not mean that the location of speech cannot be considered for purposes of regulation. It does mean that place cannot be used as a tool of "content neutral" analysis to control and regulate speech without fully considering the consequences to public discourse. Place can be "viewpoint neutral," but no regulation that has the effect of eliminating speech from the public sphere can be, strictly speaking, "content-neutral." What we need is to develop a new way of thinking about the place of speech as centrally important to all First Amendment policy and practice. We need to give speech the "pride of place."

The judicial presumption should favor speech and place for speech. "Place as property" should only rarely be allowed to trump speech,

299. *See supra* notes 127-30 and accompanying text.

particularly when that speech is political and aimed at public discourse. Where the content of speech figures into the reasoning state regulators employ to control "secondary effects," it would be wise to utilize heightened scrutiny. One way to address the doctrinal problems inherent in the Court's "public forum" doctrine presented in this Article is to adopt heightened scrutiny across all fora rather than applying strict scrutiny to restrictions on traditional fora, intermediate scrutiny to restrictions on designated public fora, and "reasonableness" scrutiny to restrictions on nonpublic fora.[300] No doubt, more exacting scrutiny of restrictions on use of nontraditional fora would result in more decisions protecting speech. Doctrinal revision attempting to reconcile conflicting and confused Court decisions by tinkering with the standard of review, although helpful, misses the broader point. More than altering the level of scrutiny, however, we need a reorientation that gives speech priority over place, and that recognizes the importance of public places for speech to occur and the importance of space on existing venues for a plurality of voices. Moreover, raising the level of scrutiny under existing doctrine accepts that it is appropriate to distinguish analytically between traditional public fora and nontraditional fora when it comes to considering the effects of regulating place on speech. It accepts that analytically, place is to be considered before speech. An example of how to avoid giving place analytic priority over speech is Judge Johnson's "principle of proportionality" in the Selma case.[301] New terms of analysis such as these would enable the Court and commentators to foster new doctrinal approaches aimed at better protecting and fostering public discourse.

A second implication, though not a direct focus of this Article, is that local decisions made by actors such as mayors and local police chiefs can allow speech to flourish in a broader range of places. Creating a culture that values the public expression of speech and that recognizes the value and need for public appearances is a project for us all, not merely for nine supreme jurists. Fundamentally, as Arendt argues, we protect public appearances for public discourse not simply for its instrumental value for deliberation, but for the intrinsic value of creating citizens in their fullest form.

Within the doctrines of public fora and media access, the figure of the dissenter is rendered invisible. Without space or place for her appearance, we lose something at the heart of the free speech tradition.[302] It is in thinking about the role of place and how it functions in relation to our other

300. This kind of approach is suggested in Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 Stan. L. Rev. 929 (2000); *see also* Massey, *supra* note 267.

301. *See* Frank M. Johnson, *Civil Disobedience and the Law*, 44 Tul. L. Rev. 1, 4 (1969).

302. "[T]he First Amendment serves to encourage and protect those who speak out against established customs, habit, institutions, and authorities—whether or not they inhabit the public sphere. . . . [I]t supports the American ideal of protecting and supporting dissent by putting dissenters at the center of the First Amendment tradition." Shiffrin, Dissent, *supra* note 1, at 128.

values such as liberty, autonomy, and deliberation that one is required to first ask when regulating speech by regulating place is appropriate. This call for dialogue is a call within a rich free speech tradition. As Justice Kennedy observed, "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place."[303]

## CONCLUSION

This Article presents an argument about the role of place in First Amendment theory and policy. It seems obvious that we need a place from which to exercise our First Amendment rights. But, as we have seen, the Court's doctrine with regard to place and space does not view the point as quite so obvious. Indeed, like property ownership, public fora are already distributed by either tradition or statute. Tradition is a kind of adverse possession right for places to speak, alterable by practice or legislative decree. Architects and urban planners have bemoaned for years that we have lost a sense of space and place in how we interact with our fellow denizens.[304] What has been less often noted is the loss of a sense of place in our policies of speech. This observation does not entail the need for a large, overarching theory, but it does entail an urgent concern—particularly given the direction of policy in an era increasingly dominated by concerns over public security. We have shed places and spaces—airports, sidewalks, malls, and even street corners—with no accompanied gain in the robust appearance of forms of autonomy or deliberative democracy.[305] Dissent is increasingly displaced with the consequence that the figure of dissent is increasingly disappearing from public discourse. As Justice Kennedy observed concerning the rigid application of the public forum doctrine, "In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity."[306] We would not sound any alarms if "our expressive activity" referred only to the dominant discourse of the dominant group who possessed a monopoly on venue and programming. Yet, as we have seen, the values of free speech are directed towards the possibility of something new, what Arendt calls natality, which in its very nature must

303. United States v. Kokinda, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring).

304. *See, e.g.*, Peter Calthorpe, The Next American Metropolis: Ecology, Community, and the American Dream 17 (1993) (advocating new urbanist neighborhood design in which "[a]t the core of this alternative, philosophically and practically, is the pedestrian"); Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 334-36 (1996) (looking at the social consequences of land use decisions).

305. Perhaps an exception to this, however, is the Internet. *See supra* note 279 and accompanying text.

306. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 697-98 (1992) (Kennedy, J., concurring).

make its initial appearance as dissent. Thus, "our expressive activity" to which Justice Kennedy refers is centrally the activity of dissent.[307]

From the perspective of free speech theory, both the values of human autonomy and deliberative democracy require a robust protection of the places and spaces for speech and public discourse. As this Article has demonstrated, current Supreme Court doctrine does not effectively protect speech from the supposed content-neutral regulation of place. Speech is suppressed through control of the places and spaces where speech occurs. Doctrinal adjustments, such as mandating heightened scrutiny for all regulations of place that have substantial consequences for speech and public discourse, would no doubt protect and foster more speech. This Article argues that, at a minimum, the Court should adopt such doctrinal changes. Yet more than technical doctrinal solutions are needed. We need to rethink and rearticulate the importance of public places for our free speech tradition in the way broadly indicated by Hannah Arendt's political philosophy. Personhood and human autonomy can only exist and develop in fullest form within social structures that provide public places and spaces for human interaction and discourse. Recognizing this fact has repercussions for land use development, local police practices, public transportation, methods of issue advocacy, political advocacy and elections, as well as judicial doctrine under the First Amendment. This Article has diagnosed the problem and sketched the broad parameters of a solution. The details will be found in the conversation that follows.

We celebrate the development of the free speech tradition, and indeed we should. However, what is seldom noted is the price we have paid, and the grounds upon which this achievement stands.[308] Eugene Debs served a lengthy prison sentence, as did Charles T. Schenk and many others prosecuted as political dissenters. After decades of living in error, the Court corrected its philosophical vision, interrupting the direction of its doctrine and recognizing with Brandeis that the vitality of our democracy rests on openness and exchange. We must not forget that our self-congratulated tradition has not been achieved without the misery of some. And furthermore, the cost of suppressing core political speech cannot be measured. Because we cannot hear what has not been uttered, and because we cannot see what has been made invisible, the shape and development of the political body will remain distorted by the constitutional failures to protect and promote the places where "We the People" make our appearances.

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307. *See* Shiffrin, Dissent, *supra* note 1, at 18 (arguing that "[t]he commitment to dissent and the First Amendment is of national symbolic value: it is a form of cultural glue that binds citizens to the political community").

308. There are notable exceptions. *See* David Cole, Enemy Aliens (2003); Stone, *supra* note 38. Stone's book is about the fact that "the United States has a long and unfortunate history of overreacting to the perceived dangers of wartime. Time and again, Americans have allowed fear and fury to get the better of them. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters, and then—later—regretted their actions." Stone, *supra* note 38, at 5.

Totalitarian regimes during the twentieth century sought to employ terror to foreclose the possibility of human appearances and to forbid, out of fear of human creativity, what Arendt calls natality. The ability to create something new through human action appearing before other human beings is indeed threatening to the established order. For the very condition of natality is opposed to the kind of control that seeks to preserve the established order. But Brandeis was, and continues to be, correct in perceiving that those who won our liberty

> believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[309]

The stakes for understanding and cohering First Amendment doctrine to a robust vision of the place where human autonomy might appear, one that promotes the fullest sense of collective (a shared political world) and self (identity) and determination (acting and creating the world) are no less than the importance of human existence itself: "A life without speech and without action . . . is literally dead to the world; it has ceased to be a human life because it is no longer lived among men."[310]

309. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

310. Arendt, The Human Condition, *supra* note 142, at 176. We should, however, edit Arendt to say "lived among human beings."